TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 192.

AUDLEY C. BRITTON, SURVIVING PARTNER OF BRITTON & KOONTZ, PLAINTIFF IN ERROR,

vs.

ROBERT NICCOLLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED MAY 23, 1879.

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1 At an adjourned term of the circuit court of the United States for the southern district of Mississippi, held pursuant to an order adjourning the November term, 1878, of this court until the 4th Monday of January, A. D. 1879.

Present, the honorable Robert A. Hill, United States district judge for Mississippi; Thos. W. Hunt, United States marshal for said district; and Jas. M. McKee, clerk of said court.

Among other were the following proceedings, to wit:

ROBERT NICCOLLS
vs.
AUDLEY C. BRITTON, SURV. PARTNER OF THE late banking firm of Britton & Koontz. } No. 2588.

Be it remembered that heretofore, to wit, on the 19th day of April, A. D. 1878, Robert C. Niccolls, by his attorney, filed in the clerk's office of the circuit court of the United States for said district his certain declaration, which, with the endorsement thereon, is in words and figures following, to wit:

In the circuit court of the United States for the southern district of Mississippi, to May term, A. D. 1878.

2 Robert Niccolls, a citizen of the State of Illinois, plaintiff, by his attorney, complains of Audley C. Britton, a citizen of the State of Mississippi, resident in the said southern district, and surviving partner of the late banking firm of Britton & Koontz, in the city of Natchez, in said southern district, composed of the said Audley C. Britton and George W. Koontz, now deceased, defendant, of a plea of trespass on the case:

1. For that, prior to the twenty-seventh day of April, A. D. 1874, plaintiff was the legal holder and owner, and still is the legal owner and holder, of a certain promissory note in writing in the words and figures following, to wit:

$3,666.66.] NATCHEZ, *April* 24, 1872.

Two years after date I promise to pay to my own order three thousand six hundred and sixty-six $\frac{66}{100}$ dollars, for value received, with interest from date at the rate of eight per cent. per annum.

JOHN J. LAMBERT.

Which said promissory note was, at the same time and prior thereto, and still is, endorsed upon the back thereof as follows:

3 1st. Pay the order of Jas. M. Reynolds.

JOHN J. LAMBERT.

2d. Pay to John Fleming or order.

J. M. REYNOLDS.

3d. Pay to J. S. Everet or order, without recourse on me.

JOHN FLEMING.

4th. Pay to R. Niccolls or order.

J. S. EVERET.

And across the face thereof was and is a memorandum in red ink in the words and figures following, to wit: "This note secured by deed of trust duly stamped according to law, and filed in my office April 26, 1872. A. H. Foster, cl'k, by G. F. Wood, D. C."

And being such holder and owner, the said plaintiff did, long prior to the said twenty-seventh day of April, 1874, deliver the said promissory note to the said banking firm of Britton & Koontz, at Natchez, for collection, and that the same should be duly and legally presented at its maturity, to wit, April 27, 1874, to the maker thereof for payment, and if not paid by him that it should be duly and legally protested
4 for non-payment, and that notice of such demand, non-payment, and protest should be duly and legally communicated to the several endorsers upon said promissory note; all which the said Britton & Koontz then and there had notice, and which they then and there undertook to do and perform with proper care and diligence, and for such reasonable compensation as by the of trade they were entitled to demand and have, which plaintiff was then and there willing, able, and ready to pay.

2. And for that also, prior to the 27th day of April, 1875, the said plaintiff was the legal holder and owner, and still is the legal holder and owner, of a certain other promissory note in writing in the words and figures following, to wit:

$3,666.66.] NATCHEZ, *April 24th*, 1872.

Three years after date I promise to pay to my own order three thousand six hundred and sixty-six $\frac{66}{100}$ dollars, for value received, with interest at the rate of eight per cent. per annum from date.

JOHN J. LAMBERT.

Which said promissory note was, at the said time and prior
5 thereto, and still is, endorsed upon the back thereof as follows:

1. Pay to the order of James M. Reynolds.

JOHN J. LAMBERT.

2. Pay to John Fleming or order.

J. M. REYNOLDS.

3. Pay to J. S. Everet or order, without recourse on me.

JOHN FLEMING.

4. Pay to R. Niccolls or order.

J. S. EVERET.

And across the face thereof was and is a memorandum in red ink in the words and figures following, to wit: "This note secured by deed of trust duly stamped according to law, and filed in my office April 26th, 1872. A. H. Foster, cl'k, by G. F. Wood, D. C."

And being such owner and holder, the said plaintiff did, long prior to the said twenty-seventh day of April, 1875, deliver the said promissory note to the said banking firm of Britton & Koontz, at Natchez, for collection, and that the same should be duly and legally presented at

its maturity, to wit, April 27, 1875, to the maker thereof for pay-
6 ment, and if not paid by him that thereupon the said note should be duly and legally protested for non-payment, and due and proper notice of such demand, non-payment, and protest should be given to the several endorsers upon the said last-mentioned note; of all which the said Britton & Koontz had notice, and which they undertook to do and perform with proper care and diligence, and for such reasonable compensation as by the course of trade they were entitled to demand and have, which plaintiff then and there was willing, able, and ready to pay.

And plaintiff further states that he took the said several notes in the usual course of business, prior to their maturity, and paid a valuable consideration therefor; that the property conveyed in trust to secure said promissory notes has been duly and legally sold, and that the amount realized for credit of the said note due April 27, 1874, equaled the sum of twenty-two hundred and seven $\frac{50}{100}$ dollars, leaving the balance of said note, with interest, and all of the said note due April 27th, 1875, and interest, due and unpaid; that on the 27th April, 1877,
7 he recovered judgment against the said John J. Lambert for the sum of nine thousand six hundred and sixty-six $\frac{66}{100}$ dollars, a remittiter being entered thereof as of that date for the sum of two thousand three hundred and thirty-two $\frac{72}{100}$ dollars, so as to make the said judgment conform to the exact amount due upon the said promissory notes, and that execution of said judgment was duly and legally returned "nulla bona."

And the plaintiff further avers that the said Britton & Koontz, bankers as aforesaid, disregarded and neglected their duty in the premises, and failed and neglected duly and legally to present or cause to be presented to the maker, John J. Lambert, for payment, the said several promissory notes as they respectively became due and payable, and duly and legally to cause the same to be protested for non-payment, and duly and legally to cause notices thereof to be forwarded to the endorsers upon the said promissory notes, but so carelessly and negligently proceeded in and about the performance and discharge of their duty in the premises that no proper or legal presentations of said notes, at
8 their respective maturity, for payment to the said maker, were made; whereby, and by reason of the negligence of the said Britton & Koontz, plaintiff lost all recourse upon the said endorsers upon the said promissory notes, and was put to trouble and expense.

And the plaintiff further avers that on the 29th day of March, 1876, he commenced his action in the circuit court of the United States for the district of Kansas against the endorsers James M. Reynolds and J. S. Everet to recover the sums of money due and owing upon the said several promissory notes, and recovered judgment by default against the said Everet for the same, but the said Everett was then and still is insolvent, and execution thereof was duly and legally returned "nulla bona." That afterwards, to wit, on the 5th day of December, 1876, upon pleadings and proofs, the said cause was considered by the said circuit court, and judgment rendered in favor of the said James M. Reynolds and against plaintiff, because of the failure on the part of the said Britton & Koontz to discharge their duty in and about the pre-
9 sentation of the said notes for payment, the protest thereof for non-payment, and the transmission of notices, and their negligence in that behalf.

Whereby plaintiff hath been greatly damaged, to wit, in the sum of ten thousand dollars, and therefore he sues, &c.

NUGENT & McWILLIE, *P. Q.*

Britton & Koontz to Robert Niccolls, dr.

To amount two promissory notes of Jno. J. Lambert, dated April 24, 1872, due at 2 and 3 years, for $3,666.66, lost to plaintiff by your negligence in having same presented for non-payment and protested..... $10,000

(Endorsed:) Filed April 19, 1878. Geo. T. Swann, clerk, by J. M. McKee, D. C.

And upon the day and date of the filing of said declaration a summons issued from the clerk's office of said court, which, with the return of the marshal thereon, is in the words and figures following, to wit:

10 UNITED STATES OF AMERICA,
Southern District of Mississippi, sc:

The President of the United States to the marshal of the southern district of Mississippi, greeting:

We command you that, without delay, you summon Audley C. Britton, surviving partner of the late banking firm of Britton & Koontz, defendant, residing in said district, and citizen of the State of Mississippi, that he be and appear at the circuit court of the United States, to be held at the court-room thereof, in the city of Jackson, in and for the southern district of Mississippi, on the first Monday of May next, to answer to Robert Niccolls, plaintiff, who is a citizen of the State of Illinois, of a plea of trespass on the case for the $10,000 damages occasioned plaintiff by reason of the failure of said Britton & Koontz to present to the maker for payment, protest for non-payment, and notify the endorsers of two certain promissory notes made by John J. Lambert, payable
11 to his own order, each for the sum of $3,666.66, dated April 24th, 1872, and due respectively 2 and 3 years after date, with interest at 8 per cent. per annum, which said notes were both endorsed by the said Lambert to J. M. Reynolds, and by the said Reynolds to John Fleming, and by the said Fleming to J. S. Everet, and by the said Everet to plaintiff, and that he do file his plea or defense in said court on or before the said meeting thereof, or judgment will be given against him by default.

And have you then there this writ, and how you have executed the same.

Issued under my hand, with the seal of said court hereto affixed, at Jackson, in said district, this 19th day of April, A. D. 1878.

[SEAL.] GEO. T. SWANN, *Clerk*,
By J. M. McKEE, *D. C.*

Served personally on H. Britton, by reading him the contents of this writ and handing him a true copy thereof, this 25th April, '78.

THOS. W. HUNT,
U. S. Marshal.

And afterwards, to wit, on the 6th day of May, A. D. 1878, the
12 defendant, by attorney, filed his two certain pleas on said cause in words and figures following, to wit:

Circuit court of the United States for the southern district of Mississippi, May term, 1878.

ROBERT NICCOLLS
vs.
AUDLEY C. BRITTON. } Case.

1. And the said defendant, by A. H. Handy, his attorney, comes and defends the wrong and injury, and says that the said plaintiff ought not to have and maintain his aforesaid action thereof against said defendant, because he says that the said defendant is not guilty of the said wrongs in the said plaintiff's declaration mentioned, or any or either of them, and of this he puts himself upon the country; and plaintiff doth the like.

2. And for further plea the said defendant says actio non, &c., because he says there is no such record of a judgment in the circuit court of the United States for the district of Kansas against the said plaintiff in the action therein alleged to have been brought by said plaintiff in said court against James M. Reynolds therein named, in man-
13 ner and form as alleged by said plaintiff in his declaration in this action, and this he is ready to verify by the said record; wherefore he prays judgment, &c.

A. H. HANDY,
Att'y for Def't.

(Endorsed:) Filed May 6th, 1878. J. M. McKee, D. C.

Replication to 2nd plea.

And for replication to defendant's second plea plaintiff says that there is such record as in said plea and declaration alleged, and this he prays may be inquired of by the court; and defendant doth the like.

NUGENT & McWILLIE, *P. Q.*

(Endorsed:) Filed May 17, 1878. Jas. M. McKee, clerk.

And on the 28th day of January, A. D. 1879, being a day in said January term, 1879, aforesaid, an order was made in said cause in words and figures following, to wit:

ROBERT NICCOLLS
vs.
AUDLEY C. BRITTON, SURV., &C. } 2588.

By consent of counsel the trial of this cause is hereby set for Wednesday of the 2d week of this term.

14 And afterwards, to wit, on the 5th day of February, A. D. 1879, being a day in said term last above mentioned, an order was made in said cause in words and figures following, to wit:

ROBERT NICCOLLS
vs.
AUDLEY C. BRITTON, SURV., &C. } 2588

On motion of W. L. Nugent, esq., of counsel for plaintiff, it is ordered

by the court that plaintiff have leave to file his amended declaration herein, which was accordingly done, and the amendment allowed.

15 And on the 5th day of February, A. D. 1879, an amendment to the declaration was filed, by leave of court, which is in the words and figures following, to wit:

Circuit court of the United States for the southern district of Mississippi.

ROBERT NICCOLLS, PLAINTIFF,
vs.
AUDLEY C. BRITTON, SURV. PARTNER, &C. } 2588.

Amend declaration by inserting at the end of line ten, page 4, of declaration, the following counts:

3. And for that also, long prior to the 27th day of April, A. D. 1874, plaintiff was the legal holder and owner, and still is the legal holder and owner, of a certain promissory note in writing in the words and figures following, to wit:

$3,666.66. NATCHEZ, *April* 24, 1872.

Two years after date I promise to pay to my own order three thousand six hundred and sixty-six $\frac{66}{100}$ dollars, for value received, with interest from date at the rate of eight per cent. per annum.

JOHN J. LAMBERT.

16 Which said promissory note was, at the said time and prior thereto, and still is, endorsed upon the back thereof as follows:

1. Pay to the order of Jas. M. Reynolds.

JOHN J. LAMBERT.

2. Pay to John Fleming or order.

J. M. REYNOLDS.

3. Pay to J. S. Everet or order, without recourse on me.

JOHN FLEMING.

4. Pay to R. Niccolls or order.

J. S. EVERETT.

And across the face thereof was and is a memorandum in red ink in the words and figures following, to wit: "This note is secured by deed of trust duly stamped according to law, and filed in my office April 26, 1872. A. H. Foster, clerk, by G. F. Wood, D. C."

And being such holder and owner, the said plaintiff did, long prior to the said 27th day of April, 1874, deliver the said promissory note to the said banking firm of Britton & Koontz, at Natchez, the said firm being then and there engaged in the business of collecting bills, notes, and other commercial paper for collection, for such reasonable compensation as by the course of trade they were entitled to demand and have, which plaintiff was then and there willing, able, and ready to pay; by means whereof it became and was the
17 duty of the said Britton & Koontz to use proper care and diligence in and about the collection of said promissory note, and on

the 27th day of April, A. D. 1874, to present the same for payment to the said John J. Lambert, and to demand payment thereof from him, and upon the dishonor of said note to give the requisite notices to the endorsers thereon, all which the said Britton & Koontz failed and neglected to do.

4. And for that also, long prior to the 27th day of April, A. D. 1875, plaintiff was the legal holder and owner, and still is the legal holder and owner, of a certain other promissory note in the words and figures following:

$3,666.66.] NATCHEZ, *April 24th*, 1872.

Three years after date I promise to pay to my own order three thousand six hundred and sixty-six $\frac{66}{100}$ dollars, for value received, with interest from date at the rate of eight per cent. per annum.

JOHN J. LAMBERT.

Which said promissory note was, at the said time and prior thereto, and still is, endorsed upon the back thereof as follows:

18 1. Pay to the order of James M. Reynolds.

JOHN J. LAMBERT.

2. Pay to John Fleming or order.

J. M. REYNOLDS.

3. Pay to J. S. Everet or order, without recourse on me.

JOHN FLEMING.

4. Pay to R. Niccolls or order.

J. S. EVERET.

And across the face thereof was and is a memorandum in red ink in the words and figures following, to wit: "This note is secured by deed of trust duly stamped according to law, and filed in my office April 26, 1872. A. H. Foster, clerk, by G. F. Wood, D. C."

And being such holder and owner, plaintiff, long prior to the said 27th day of April, 1875, delivered the said promissory note to the said banking firm of Britton & Koontz, at Natchez, for collection, the said firm being then and there engaged in the business of collecting bills, notes, and other commercial paper, for such reasonable reward and compensation as by the course of trade they were entitled to demand and have, which plaintiff was then and there willing, able, and ready to pay; by means whereof it became and was the duty of the said Britton & Koontz to use proper care and diligence in and about the collection of the said promissory note, and on the 27th day of April,
1875, to present the same for payment to the said Lambert and
19 demand payment thereof from him, and upon the dishonor of said note to give the requisite notices to the said several endorsers thereon, all which the said Britton & Koontz failed and neglected to do.

NUGENT & McWILLIE, *P. Q.*

The said defendant, by consent of plaintiff's attorney, pleads the general issue to the foregoing amendment to the declaration to have

the same effect as if formally drawn up as in the first plea to the original declaration.

A. H. HANDY,
Att'y for Def't.
NUGENT & McWILLIE, *P. Q.*

(Endorsed:) Filed by motion of the plaintiff and by leave of court, this Feb'y 5th, 1879. Jas. M. McKee, clerk.

And on the day and date last above named the following proceedings were had in said cause, to wit:

ROBERT NICCOLLS
vs.
AUDLEY C. BRITTON, SURV. PARTNER, &c. } 2588.

This day came the parties, by their attorneys, and issue being
20 joined it is ordered that a jury come, whereupon came a jury of good and lawful men, as follows, to wit: William Tramel, Thos. F. Baker, R. W. Houston, W. D. King, T. F. Tynes, J. M. Fuller, Horace Barr, Benj. Williams, John Crawford, Benj. Scott, A. C. Kerr, and J. B. Wills, who being duly elected, empanneled, sworn, and a part of the evidence submitted to them, were, by cousent of counsel, allowed to disperse until to-morrow morning, 9 o'clock, under the orders of the court.

And on the following day, to wit, the 6th day of February, A. D. 1879, the following proceedings were had in said cause, to wit:

ROBERT NICCOLLS
vs.
AUDLEY C. BRITTON, SURV. PARTNER, &c. } 2588.

This day came again the parties, by their attorneys; came again also the jury heretofore empanneled in this cause, and, by consent of counsel, said jury were allowed to disperse, under the orders of the court, until to-morrow, 9 o'clock a. m.

21 And on the 7th day of February, A. D. 1879, being a day in the last-named term of said court, a verdict was rendered in said cause in words and figures following, to wit:

ROBERT NICCOLLS
vs.
AUDLEY C. BRITTON, SURV. PARTNER, &c. } 2588.

This day came again the parties, by their attorneys; came again also the jury heretofore elected, empannelled, and sworn in this cause, as follows, to wit: William Tramel, Thos. F. Baker, R. W. Houston, W. D. King, T. F. Tynes, J. M. Fuller, Horace Barr, Benj. Williams, John Crawford, Benj. Scott, A. C. Kerr, and J. B. Wills, and being duly charged by the court and the evidence submitted to them, upon their oaths say: We, the jury, find the issue joined for the plaintiff, and assess his damages at the sum of eight thousand and ninety-five & $\frac{16}{100}$ dollars ($8,095.16)."

It is therefore considered by the court that the plaintiff do have and recover of and from the defendant the damages aforesaid, as by the

jury in their said verdict assessed, with interest thereon from this date until paid, and also the costs of this cause expended to be taxed.

22 MEMORANDUM.—Before the jurors aforesaid withdrew from the bar of the court here, the said defendant, by his attorney aforesaid, filed in court here the following bills of exceptions, to wit:

In the circuit court of the United States for the southern district of Mississippi, January special term, 1879.

ROBERT NICCOLLS
vs. } 2588.
A. C. BRITTON, SURV., &C.

Be it remembered that on the trial of this cause the plaintiff, to support the issue on his part before the jury, offered in evidence as part thereof the two promissory notes mentioned in the declaration in the words and figures set forth therein, and the endorsements thereon as therein set forth.

To the admission and reading of which in evidence the defendant, by his counsel, objected unless the plaintiff would first prove the signatures and execution of said notes of the maker and endorsers of said notes, which said plaintiff declined to do. But the court overruled said objection and allowed the plaintiff to read in evidence said notes and endorsements without any proof of the execution thereof by

23 said maker, and of the signatures of said endorsers or either of them, remarking that if in the further development of the evidence he found it error he would announce it, but which was not done. To which said ruling and allowance of the court the defendant, by his counsel, prays leave to except, and that the court will allow and sign and seal his exception, and make the same a part of the record in this cause; which is accordingly done, before the jury retire from the bar, this 7th day of February, A. D. 1879.

R. A. HILL, *Judge.* [SEAL.]

(Endorsed:) Filed Feb'y 7th, 1879. J. M. McKee, cl'k.

2nd bill of exceptions.

In the circuit court U. S. for the southern district of Mississippi, January special term, 1879.

ROBERT NICCOLLS
vs. } 2588.
A. C. BRITTON, SURV., &C.

Be it remembered that on the trial of this cause the plaintiff, to support the issue on his part before the jury, offered evidence in

24 substance and tending to prove as follows, to wit:

That the plaintiff caused to be sent to Britton & Koontz, bankers at Natchez, Mississippi, the promissory note set forth in the declaration due on 27th April, 1875, for collection by said bankers if paid, and if not paid on presentment, for protest and for notices of non-payment to the endorsers; and that the note payable 27 April, 1875, was transmitted by the plaintiff himself to said bankers, with written directions and with instructions to collect the same if paid, and if not paid to be delivered to the protesting officer for protest, and to give notices to the endorsers in order to charge them; that said notes were

received by said bankers in due time to attend to the matters mentioned in said directions; that the maker of said notes, Lambert, had, at the maturity of both of said notes, no domicil or place of business at Natchez, where said notes bore date, but resided and had his domicil on a farm about twelve or fifteen miles from Natchez, and in the same county.

25 It was further shown by the testimony of the plaintiff, as a witness in his own behalf, that before the maturity of the note due 27 April, 1874, he had no knowledge of the maker's residence, and that about January, 1875, said maker, Lambert, was residing on his plantation in the country, about twelve miles from Natchez, in the same county, but that his continuing to reside there was conditional, and that plaintiff did not know at the time of forwarding the note to defendant *the plaintiff did not know* of the maker's residence. He further testified that in an interview, about January, 1875, between Britton & Koontz and plaintiff the residence of Lambert was admitted by them and plaintiff to be on Lambert's plantation. Plaintiff also read in evidence the deposition of the notary who protested said notes, and his protests to said notes returned and attached thereto and by him to Britton & Koontz, who returned the same to plaintiff, which deposition showed, amongst other things, that one of the members of said firm of Brit-

26 ton & Koontz handed said notes to said notary, as a duly appointed officer of the law, at the close of banking hours, on the respective dates of their maturity, for the purpose of said notary demanding payment, and in the event of non-payment for protest by him, without any special instructions from the firm as to what he was to do in the premises further than that said notes were handed to him to demand payment, and in the event of non-payment to protest them, and give notice of non-payment to the endorsers, at specified places; that said notary knew, at said times, that Lambert, the maker, resided about eighteen or twenty miles outside the city of Natchez, on his plantation, in Adams County; that said notary knew Lambert did not have a place of residence or business in Natchez, and went to the post-office, city hall, and court-house, three most public places in Natchez, and inquired for John J. Lambert, but could not find him, to demand payment of said notes; that he protested notes and gave notices to

27 the endorsers of their non-payment; that, in his efforts to make presentment for payment, he acted upon his own opinion and without instruction from Britton or Koontz upon the matter, and because he considered that said notes, being dated at Natchez, and no place of payment being stated therein, the place of presentment was in law at Natchez, and not at the maker's domicil, outside of Natchez, and that it was not his duty to go to his domicil; that he knew that Lambert did not reside then at Natchez, and had no place of business there, but does not know that B. & K. knew this, but believes they did not, and that he never informed them of the fact.

Plaintiff also proved by the depositions of some six witnesses residing at Natchez and in Adams County, Mississippi, that said Lambert did not reside or do business in Natchez, but on his plantation in said county, at the times of maturity of said notes; but they could not state whether his said residence was generally known in Natchez. Some of said witnesses stated that he had relatives then in Natchez

28 who knew the fact of his residence in the county outside of Natchez, and that he traded in Natchez and bought goods and sold cotton there, but could not state whether or not Britton or Koontz knew the same.

It was proved by Lambert that he executed and endorsed the notes, and evidence was given to the jury to prove, or tending to prove, the other endorsements on the notes, and that his residence on his plantation was generally known.

It was admitted by defendant that after the maturity of said notes said Lambert was sued and judgment obtained thereon, and that execution thereon was returned, "nulla bona;" that in a suit against Everet, the endorser, a judgment by default had been obtained, and execution returned "nulla bona," and that in a suit of the present plaintiff against Reynolds, the first endorser of said notes, a judgment had been rendered in favor of said Reynolds, one the ground that due presentment of said notes had not been made to said maker,
29 Lambert, by reason of which said endorser had been discharged, and that if judgment had been rendered in said suit against said Reynolds, the money due plaintiff might have been made by execution.

There was proof showing, or tending to show, that Reynolds was and is solvent now. There was proof showing, or tending to show, that Lambert knew Britton and Koontz from his childhood, and that Britton and Koontz knew that Lambert did not, on the maturity of said notes, have a place of business in Natchez.

On the part of the defendant, several witnesses who had resided at Natchez, and were prominent citizens and practicing lawyers, testified to the effect that they did not think that it was well known in Natchez at the times of the maturity of the notes here in question that J. J. Lambert resided on a plantation in Adams County, and that he was generally but little known in Natchez as residing on said plantation, and that the acquaintance of said witnesses with him was slight. That said witnesses were, and had been for many years, intimately ac-
30 quainted with the members of the firm of Britton & Koontz, and that the character of both of the partners as men of intelligence, diligence, and fidelity in all matters pertaining to the presentment, protesting, &c., of commercial paper was very high in the community, and that that of the partner Koontz, who had charge of said matters in his bank, where such paper was placed there for such purposes, was distinguished; that the established custom of their bank when such paper was placed there for collection was to place the same in the hands of a regular notary, as an officer of the law, for presentment, protest, and notice to parties sought to be charged, when the same was unpaid at maturity, and that this was their custom in regard to paper owned by them as well as such as belonged to others.

Defendant Britton testified, in behalf of defendant, in substance, that his bank received the two notes before maturity, in April, 1874 and 1875, for collection, and if not paid at maturity to be protested by a protesting officer, and notices given to the endorsers, and not
31 having been paid at maturity, were severally handed by their Mr. Koontz to Hussey, a regular notary, for presentment to the maker, and if not paid thereon for protest, notices to be sent, &c.; that no information as to the residence of the maker was ever given, by writing or otherwise, and witness did not know where it was; that it was always and then the custom of the firm to give notice to the requisite parties of the amount and date of maturity of paper, whether belonging to the firm or to others, held by the firm, by placing said notices in the post-office, addressed to them, a reasonable time before such paper became payable, and if payment was not made at maturity, then to place such paper in the hands of a notary for presentment, pro-

test, &c. On cross-examination, witness stated that he did not know the residence of said Lambert in 1874 or 1875, and does not think he was well known to the banking-house of B. & K.; that he finds by their books that a note sent them for collection on April 27th, 1873, from Bloomington, Ill., was paid and proceeds remitted to the bankers
32 in Illinois who sent it, but does not know what said note was given for, and finds from examination of the books that the bank made one collection from Lambert on 27 April, 1873, but does not find how or by whom it was paid; and finds by his books that on 26th April, 1873, Lambert drew a check on the bank for $496, which had been placed to his credit in June, 1872; has no recollection of any personal transaction with him; that in 1874 and 1875 said bankers gave all notes requiring protest, &c., to Notary Hussey, then a regular notary public; that witness made no inquiry of the sheriff or tax-assessor of Adams County to learn the residence of Lambert in 1874 or 1875; that defendant's invariable custom was to have all unpaid drafts and notes protested unless otherwise instructed.

On further examination, and in rebuttal of the statements of plaintiff in his deposition as to Britton & Koontz's admissions in January, 1875, that Lambert's residence was then on his plantation in Adams County, said Britton testified, in substance, that he had no conversation with plaintiff, about January, 1875, nor at any time,
33 in relation to the notes here in question, or in relation to said Lambert or his residence, and he believes that no such admission was made by his partner Koontz as to Lambert's residence; and he annexed to this deposition a copy of a letter of Britton, taken from the letters of witness as surviving partner of B. & K., dated 17 April, 1876, and addressed to the attorneys in the suit in Kansas of plaintiff against Reynolds, in answer to a letter of said attorneys, written at the instance of said plaintiff whilst said suit in Kansas was pending, for the purpose of obtaining evidence in relation to the presentment of said notes to said Lambert, to be used in that suit; said letter of witness states that the business of said bankers as to the protesting paper, &c., in their hands for collection or protest, when necessary, was always attended to by his deceased partner, Koontz, who gave particular attention to it, as belonging to his department of their business; that Mr. K. spoke to witness, and asked him if he knew where Lambert resided, remarking that the demand must be made at his domicil, if he had any; to
34 which witness replied that he knew nothing about him; that Koontz then made the same enquiry of several persons who came into the bank, and none of them could give him any information about Lambert; that K. then left the bank for the express purpose of trying to learn where Lambert lived, and he told witness that he could learn nothing about him, and that the notary would have to comply with the law in such cases, and present at several of the most public places; that witness is certain that Koontz made diligent efforts to ascertain Lambert's place of residence, and that they were unsuccessful; that witness never knew where Lambert resided, and that the above facts stated in the letter show that Mr. Koontz did not know it, and could not find where it was after diligent inquiry.

This witness further testified that he never had any interview or admission as to B. & K.'s knowledge of Lambert's residence, as stated in the deposition of plaintiff, and never knew or heard of it before it was stated in plaintiff's deposition here, and does not believe that
35 Mr. Koontz ever heard of any such interview or admission.

On cross-examination, the witness testified that when the notes

were handed to Hussey, the notary, it was with the customary instructions to present them to the maker and demand payment, and to protest them if not paid. The custom of the bankers was to put notices in the post-office several days in advance of the maturity of paper, notifying parties of the amount and time of maturity. Witness asked no information of plaintiff's residence; never heard of any instructions on the subject being given. The notes being dated at Natchez, the presumption was that the party lived there. In such cases it is not customary to make inquiries as to the residence of the maker, and if such instructions had been given by the holder, they would have been followed. That neither the witness nor any one in his employ presented the notes to Lambert for payment; they were handed to the notary for that purpose on the days they respectively fell due.

36 Stratton and Koontz, jr., testified, for defendant, in substance, that they were the only employees in *in* defendant's banking house at the time of the maturity of the several notes in question; that they were not notified at either of those times where the place of residence or of business of Lambert was, and do not know that Britton & Koontz, or either of them, had such knowledge; that it was their custom, when any paper was received by them with any communication or direction where such paper should be presented for payment, to inform said witnesses, as their note clerks, and they were directed to follow such instructions, and no such special instructions were given as to the notes in question; that it was the custom and course of business of B. & K. to have notices to the parties bound to pay paper put in the post-office, notifying them of the maturity and amount of such paper, several days before maturity, and this was their custom in regard to paper belonging to them alike with such as they received for collection; and if such paper is not paid at maturity it was their general custom, unless instructed to the contrary, to place such paper in the hands of a notary, if unpaid at maturity, for presentment and protest.

37 It was further proved by defendant that the first of the notes in question, due 27 April, 1874, was received for collection by Britton & Koontz from a banking-house in Bloomington, Illinois, to whom it had been endorsed by the plaintiff; that B. & K. received it on 23 April, 1874, and when they had returned the protest to said bankers in Illinois, said last-named bankers paid the protest fees thereon which had been paid by Britton & Koontz; that the second note, due 27 April, 1875, was received by Britton & Koontz in a letter from plaintiff to them, dated Bloomington, Ill., April 8, 1875, for collection, and if not paid requesting them to "have it protested, and, if possible, to have the protesting officer to ascertain whether or not Mr. Lambert has a place of business or residence in Natchez;" also requesting them to have notices of protest sent to the endorsers at specified places; that this latter note was not paid at maturity, and it was thereafter returned, with notarial protest annexed, to plaintiff, who paid B. & K. the notary's protest fees.

38 This being the substance of all the evidence in the cause, the defendant prayed the court to instruct the jury as follows, to wit:

1st. If the jury are satisfied from the evidence before them that the two notes of Lambert in question were sent or delivered by Niccolls or his agents to Britton & Koontz, in order to collect the money if paid, and if not paid, then to have said notes protested legally; that said Britton & Koontz did not know the place of residence or of doing

business of said Lambert, and, upon making diligent inquiry therefor in the city of Natchez, were unable to learn the same, and thereupon, at their maturity, handed said notes to Hussey, who was then circuit clerk of Adams County, Mississippi, for the purpose of having presentment thereof to said Lambert for payment, and to be protested in case of their non-payment, and notices thereof to be given by said notary to the endorsers of said notes, that then and under such circumstances said Britton & Koontz, or the defendant in this suit, are not liable for negligence in performing the duties intrusted to them in regard to said notes, or for the failure of said notary to discharge the
39 duties required of him in regard to demand of payment of said notes, and that the verdict should be for the defendant.

2d. That if the jury believe from the evidence that it was the established custom and course of business of Britton & Koontz, in cases where notes were placed in their hands for collection, demand, and protest, in case of non-payment, to place such notes in the hands of a notary public for the performance of these duties that this custom and course of business in such matters is to be presumed to have been known to the plaintiff when he placed the notes in question in the hands of said Britton & Koontz, and that he consented to such course in this case, and that Niccolls cannot object to the conduct of said Britton & Koontz in placing said notes in said notary's hand, at their maturity for the performance of said acts by him.

Which said instructions were severally refused by the court, to which said refusals said defendant, by his counsel, excepted, at the time and before the jury retired from the bar.

40 And at the same time the court gave the following instructions in writing to the jury, to wit:

1st. If you are satisfied from the proof that the firm of Britton & Koontz, as such bankers, received the notes mentioned for collection, it thereby became their duty to do and perform such acts as the law required to charge the endorsers upon the notes and render them liable for the payment of the sums due thereon, which was to present them for payment to Lambert, the maker, on the last day of grace, which was on the 27th days of April, 1874 and 1875, respectively, and upon non-payment to give notice thereof to the endorsers; provided, however, that the said Britton & Koontz did not do some other act or were not otherwise released from the obligation to make such demand and give such notice.

2d. It is admitted that Britton & Koontz did not themselves make presentment and demand of payment of either of said notes. The defendant, to excuse himself, has offered proof that said notes were, upon the days they respectively fell due, placed in the hands of Hussey, a notary public, with instructions to present the same
41 and demand payment, and, in default thereof, to protest the same and give notice to the endorsers. If you shall find from the evidence that said Britton & Koontz used due diligence in ascertaining the residence of Lambert, the maker of the notes, and placed the notes in the hands of Hussey, a duly qualified notary public, within a reasonable time for said Hussey to present the notes to Lambert and demand payment, upon the day the same fell due, as above stated, and at his residence or place of business, and gave to said notary all the information which they had or might have obtained by reasonable diligence of the place of his residence or business, such acts upon their part would exonerate them from the duty of making presentment and demanding payment by themselves or agent, the said notary, being

an officer appointed by law, whose official duty it was (his fees being paid or tendered) to make such presentment and demand, and, in default, to give such notice.

3d. If the proof shows that said Hussey was, at the time the
42 notes fell due, the clerk of the circuit court of Adams County, the law made him ex officio a notary public for that county, with full power to do and perform all notarial acts.

4. If the proof show that Britton & Koontz used reasonable diligence to ascertain the residence or place of business of Lambert, and failed to ascertain the same, they were excused from making the demand of payment themselves and from communicating such information to Hussey, the notary. The question of diligence is a question of fact to be determined by you from all the evidence. Reasonable or due diligence is such as a prudent man would exercise in his own affairs—such as inquiring of those who would most likely know the place of residence of Lambert—the burthen of proving which is on the defendant.

5th. If you shall find from the evidence that Britton & Koontz performed the duties required of them by the law in regard to said notes, as stated in these instructions, you will in your verdict find for the defendant.

6th. But if you shall find that they failed and neglected to discharge such duty, and shall further find from the evidence that in
43 consequence of such failure and neglect the endorser Reynolds was discharged from liability upon his endorsements upon said notes, and that he was solvent, and that the amount due thereon could have been recovered from him by due process of law, then your verdict should be for the plaintiff for the amount shown to be due upon said notes up to the present time.

To the giving of which said last instructions, severally, said defendant excepted in due form, before the jury retired from the bar. And to the refusal of said instructions prayed by said defendant as aforesaid, and to the giving of which said several instructions by the court, said defendant prays leave to except, and that the court will sign and seal his several exceptions to the said action of the court, and make the same a part of the record in said cause; which is accordingly done, before the jury retired from the bar, this 7th of February, 1879.

R. A. HILL, *Judge*. [SEAL.]

(Endorsed:) Filed Feb. 7th, 1879. J. M. McKee, clerk.

And afterwards, to wit, on the 20th day of February, A. D. 1879, being a day in the last above-named term of said court, an order
44 granting a writ of error was made in said cause in words and figures following, to wit:

ROBERT NICCOLLS
vs.
AUDLEY C. BRITTON, SURVIVING PARTNER, &C. } 2588.

On motion of defendant, by A. H. Handy, his attorney, in open court, and in presence of the attorney for the plaintiff, it is ordered by the court that a writ of error to the Supreme Court of the United States on the judgment rendered on the 7th day of February, A. D. 1879 (a day of this term), issue to the next term of said court.

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the southern district of Mississippi, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you between Robert Niccolls, complainant, and Audley C. Britton, surviving partner of the late banking firm of Britton & Koontz, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears:

We being willing that error, if any hath been done, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the

46 second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the second Monday of October, in the year of our Lord one thousand eight hundred and seventy-eight.

Witness also the signature of the clerk and the seal of the circuit court of the United States for the southern district of Mississippi, hereto affixed, at office at Jackson, in said district, this 8th day of March, A. D. 1879.

[SEAL.] JAS. M. McKEE, *Clerk.*

(Indorsed:) No. 2588. U. S. circuit court, so. dist. of Miss. Audley C. Britton, plaintiff in error, v. Robert Niccolls, defendant in error. Writ of error. Filed March 18, 1879. Jas. M. McKee, clerk.

47 And afterwards, to wit, on the 19th day of March, A. D. 1879, a writ of error and supersedeas bond was filed in the clerk's office of said court in words and figures following, to wit:

Know all men by these presents that we, Audley C. Britton, surviving partner, &c., and E. J. Guice and George W. Green, sureties, are held and firmly bound unto Robert Niccolls in the full and just sum of sixteen thousand one hundred and ninety & $\frac{32}{100}$ ($16,190.32) dollars, to be paid to the said Robert Niccolls, his certain attorneys, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 14th day of March, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately, at a term of the circuit court of the United States for the southern district of Mississippi, in a suit pending in said court between Robert Niccolls, plaintiff, and Audley C. Britton, surviving partner of the late banking firm of Britton & Koontz, defendant,

48 a judgment was rendered on the seventh day of February, A. D. 1879, against the said Audley C. Britton, surviving partner, for the sum of eight thousand and ninety-five dollars and sixteen cents, and the costs of said suit, and the said Audley C. Britton, surviving

partner, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Robert Niccolls citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such that if the said Audley C. Britton, surviving partner, shall prosecute his said writ of error to effect, and if he fails to make his plea good shall answer all damages and costs, then the above obligation to be void; else to remain in full force and effect.

A. C. BRITTON, *Survivor, &c.* [SEAL.]
E. J. GUICE. [SEAL.]
GEO. W. GREEN. [SEAL.]

49 UNITED STATES OF AMERICA,
Southern District of Mississippi, Adams County:

This day personally came and appeared before me, the undersigned, United States commissioner in and for the said district, E. J. Guice and Geo. W. Green, who, each being by me duly sworn according to law, depose and say that they are each worth the sum of sixteen thousand one hundred and ninety & $\frac{32}{100}$ dollars in visible property not exempt from execution, over and above all their just debts and liabilities.

In testimony whereof I have hereto set my hand and affixed my official seal, at Natchez, in said district, this 14th day of March, A. D. 1879.

[SEAL.] FRED PARSONS,
U. S. Comm'r.

I approve the foregoing bond, with the sureties thereto, as good and sufficient to operate as a supersedeas upon the writ of error in the cause mentioned therein, this March 18, 1879.

R. A. HILL,
United States District Judge for Mississippi.

(Endorsed:) Filed March 19, 1879. Jas. M. McKee, clerk.

50 SOUTHERN DISTRICT OF MISSISSIPPI, *ss:*

I, James M. McKee, clerk of the circuit court for the United States for the southern district of Mississippi, hereby certify that the foregoing annexed 49 pages contain a full, true, and complete transcript of the record of said court in the cause therein stated, as the same remains in said court, together with a true copy of the writ of error bond filed in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, in Jackson, this 4th day of April, A. D. 1879.

[SEAL.] JAS. M. McKEE, *Clerk.*

Clerk's fee for transcript, $11.00; paid by plaintiffs in error.
JAS. M. McKEE, *Clerk.*

51 The United States of America to Robert Niccolls, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the

clerk's office of the circuit court of the United States in and for the southern district of Mississippi, at the city of Jackson, in said State, to a judgment at law in said court, rendered on the seventh day of February, A. D. 1879, in your favor, against Audley C. Britton, surviving partner of the late banking firm of Britton & Koontz, for the sum of eight thousand and ninety-five & $\frac{16}{100}$ dollars, with interest and costs of said suit, in which said writ of error the said Audley C. Britton, surviving partner, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why said judgment rendered against said plaintiff in error as in said writ of error mentioned should
52 not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable R. A. Hill, judge of the United States in and for the southern district of Mississippi, and acting herein, and on the trial of the aforesaid cause in said circuit court, as a member of the circuit court in and for the circuit aforesaid, this 18th day of March, A. D. 1879.

R. A. HILL,
U. S. D. Judge, &c.

(Indorsed:) No. 2588. U. S. circuit court, so. dist. of Miss. Robert Niccolls v. Audley C. Britton, surviving partner, &c. Citation on writ of error to Supreme Court.

Served personally on W. L. Nugent, attorney of record, by presenting to him the original writ, he hearing the reading thereof, & handing him a true copy thereof, on the 20th day of March, '79.

THOS. D. HUNT,
U. S. Marshal, So. Distr'ct Miss.

Filed Mc'h 19th, 1879. Jas. M. McKee, cl'k.

(Indorsement on cover:) No. 192. Audley C. Britton, surviving partner of Britton & Koontz, plaintiff in error, vs. Robert Niccolls. S. Mississippi C. C. U. S. Filed 23 May, 1879.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

AUDLEY C. BRITTON,
Surviving Partner
of Britton & Koontz,
vs.
ROBERT NICCOLLS.
No. 192.

STATEMENT OF FACTS.

The point in this case is as to the liability of an agent to whom a note is sent for collection. The precise questions are whether an agent doing business at a particular place, receiving there for collection without instructions a note dated there, assumes the duty of presenting the note for payment at that place only, or the duty of doing all that is necessary to charge the endorser, and whether the endorser is not charged without actual presentment to the maker if the latter is not on the day of presentment at the place at which the note is dated.

The plaintiff in error is the survivor of the firm of Britton & Koontz, which, in April, 1874, was doing a banking business at Natchez. (Fol. 24.)

On the 23d of April, 1874, Britton & Koontz received at Natchez from Niccolls, the defendant in error, through a banking house in Bloomington, Illinois, (fol. 37) a note in these words (Fol. 2):

NATCHEZ, *April* 24, 1872.

Two years after date I promise to pay to my own order three thousand six hundred and sixty-six 66 100 dollars, for value received, with interest from date at the rate of eight per cent. per annum.

JOHN G. LAMBERT.

The endorsements on this were as follows:

Pay to the order of James W. Reynolds.

JOHN G. LAMBERT.

Pay to John Fleming or order.

JAMES W. REYNOLDS.

Pay to G. S. Everet or order without recourse on me.

JOHN FLEMING.

Pay to R. Niccolls or order.

J. S. EVERET.

The only instructions sent with this note were that it was to be collected, and if not paid that it was to be protested and that notices were to be sent to the endorsers. (Fol. 24)

There is no evidence that any information as to Lambert's (the maker) residence was given to Britton & Koontz.

At the time of the maturity of this note, Lambert, the maker, had his residence on his plantation from 12 to 20 miles from Natchez. (Fols. 27, 25 and 26.) At that time Britton did not know his residence. (Fol. 31.) There is no evidence that Koontz knew it. Niccolls did not know it (Fol. 25.)

There is no evidence that Niccolls made known to Britton & Koontz his ignorance in this respect.

Lambert had then no place of business or residence in Natchez. (Fol. 26.)

The note, not having been paid on the 27th of April, was, at the close of banking hours on that day, handed by the plaintiff in error to a notary public for demand of payment and protest. (Fol. 26.) The notary knew of Lambert's domicile at a distant plantation, but did not communicate his knowledge to plaintiff's firm. (Fol. 27.) He, the notary, sought Lambert at the City Hall, Post Office and Court House, the most public places in Natchez and not finding Lambert, protested the note. (Fol. 26.)

The protest was returned to the defendant in error who paid the fees and made no complaint. (Fol. 27.)

Shortly after the 8th April, 1875, Niccolls sent from Bloomington, Illinois, to Britton & Koontz, at Natchez, a second note identical in its terms with the former one, except that it was payable in three years, the 27th April, 1875, being the day for its presentment. (Fols. 4, 37.)

The instructions given by Niccolls in his letter accompanying this note were, "have it protested, and if possible to have the protesting officer to ascertain whether or not Mr. Lambert has a place of business or residence in Natchez." (Fol. 37.)

Niccolls testified that in January, 1875, Britton & Koontz admitted Lambert's residence to be then on his plantation. (Fol. 25.) This was denied by Britton (Fol. 32, 33), and there was other evidence negativing this statement. (Fols. 33–37.) This fact was not submitted to the jury.

At the time of the transmission of the second note, no information was given to Britton & Koontz as to Lambert's residence. There was no evidence tending to show at that time any knowledge on their part of his residence. Lambert had then no place of business nor residence in Natchez. (Fol. 26.)

The same course was pursued with the second note which had been pursued with the first, and the same results followed.

Niccolls paid the protest fees on the second note. (Fol. 37.)

Lambert, the maker, and Everet, an endorser of the notes, are insolvent. (Fol. 28.)

Niccolls sued Reynolds, an endorser, in the United States circuit court in Kansas, and was defeated on the ground of non-presentment to Lambert. (Fol. 28.)

The first prayer of Britton & Koontz is in effect a request to charge that in the absence of knowledge on their

part of Lambert's residence their duty was limited to presentment in Natchez. (Fol. 38.)

This prayer was refused.

The court charged the jury in these words: "If you are satisfied from the proof that the firm of Britton & Koontz as such brokers received the notes mentioned for collection, it thereby became their duty to do and perform such acts as the law required to charge the endorsers upon the notes and render them liable for the payment of the sums due thereon, which was to present them for payment to Lambert, the maker," &c. (Fol. 40.)

To this charge Britton and Koontz excepted.

The verdict was for the plaintiff Niccolls below, and judgment was entered thereon.

Assignment of Errors.

I. The court erred in ruling that the receipt of the notes for collection by Britton & Koontz, made it their duty to do all acts required to charge the endorsers. (Fol. 40.)

II. The court erred in ruling that actual presentment of the notes for payment was necessary to charge the endorser. (Fol. 40.)

III. The court erred in ruling that the question of diligence was one for the jury. (Fol. 42.)

Argument.

I. It was error to charge that there was a duty imposed upon Britton & Koontz "to do and perform such acts as the law required to charge the endorsers upon the notes."

If this means to assume that the contract of an agent for collection is, as matter of law, to do all that it is the duty of his principal to do, it would be eroneous.

In Triplet *vs.* Bank of Washington, 1 Peters, 35, this court said: "The bank was the agent of the holder, not of the drawer, and might consequently so act as to discharge the drawer without becoming liable to its principal."

The duty of the agent for collection depends upon his contract. There being in this case no express contract, the contract of the parties is to be inferred from the facts of the particular case.

The court in this case inferred from the single fact of *receiving the note for collection*, the duty of Britton & Koontz to do all things necessary to charge the indorsers.

It cannot be shown that, as matter of law, the mere receipt of a note for collection imposes on the agent so extensive a duty.

Neither can the bare receipt of a note for collection, judged by the common understanding and dealing of men, furnish ground for such an inference. The business of a bank, like the business of many other callings is localized; it performs its functions in a limited territory. In the absence of all other facts and of stipulations, the natural inference from the receipt of a note for collection, is that a bank undertakes to collect the note where it resides.

On the principle ruled by the court below, the duty of Britton & Koontz, on receiving the note for collection, was not merely to find Lambert on his plantation near Natchez, but at any place he might happen to be in.

If then the receipt of the note for collection had been the only fact in the case, the charge would have been wrong.

But it was the duty of the court in construing the contract to look at all the facts adduced in evidence, and it is submitted that the undisputed facts of the case, show that Britton & Koontz undertook to act as agents for collection only in the city of Natchez.

The facts differ as to the two notes.

As to the first note:

Britton & Koontz were bankers, doing business in Natchez. The note bore date at Natchez. The note was sent to them at Natchez for collection. The note was sent to them so as to reach them only four days before the day of presentment. The instructions sent were only to collect the note or to protest it. No information was communicated to Britton & Koontz as to the whereabouts of Lambert. Niccolls was in fact ignorant of them. *He did not make known this ignorance to Britton & Koontz.*

These facts taken together show clearly that Niccolls did not expect of Britton & Koontz more than that they should present the note in Natchez.

But the contract cannot be construed to be one to present generally without imputing fraud to Niccolls. It is incredible that Britton & Koontz would have undertaken on the 23d of April, 1874, to present a note on the 27th of April, 1874, to Lambert wherever he might then be, if they had not believed that he was then in Natchez. The acts of Niccolls naturally created such a belief on their part. Niccolls' silence as to the real state of the case was the cause of their entering into so onerous a contract and was in law a fraud upon them. But fraud is not to be presumed.

If the holder of a note, cognizant of the residence of the maker can employ an agent for collection without making known to him all the difficulties attending it and hold him responsible for a failure to present, it would be profitable in all such cases for the holder to resort to an agent.

Farther than this, Niccolls on hearing of what had been done made no complaint, but paid the protest fees. When he learned in January, 1875, the fact of Lambert's residence on his plantation, he made no complaint. In April, 1875, he sent a similar note to Britton & Koontz for collection; no complaint is heard until April, 1878. There is,

therefore, ample proof of ratification by Niccolls and such ratification shows his understanding of the contract to have been that contended for by the plaintiffs in error.

As to the second note.

This note reached Britton & Koontz on the 8th April, 1875, the 27th day of that month being the day of presentment.

The instructions sent with the second note were fuller than those given with the first, and were: "*have it protested, and if possible to have the protesting officer to ascertain whether or not Mr. Lambert has a place of business or residence in Natchez.*" (Fol. 37.)

These words constitute an express contract between the parties, and it is impossible not to construe them as meaning that the duty of Britton & Koontz was confined to presenting this note in Natchez.

It will be found more difficult in this case than in the former to excuse Niccolls from the charge of fraud if the contract was one to present the note generally.

Nicbolls testified (Fol. 25) that he knew in January, 1875, that Lambert's residence was on his plantation near Natchez. Yet, in sending the second note for collection on the 8th April, 1875, he did not communicate this knowledge to Britton & Koontz.

It was plainly his duty to do so.

"The holder should not fail to communicate any knowledge he may have as to the residence or place of business of the party to whom the notary is to make presentment or give notice, and if he does not do so, he will be bound by any subsequent mistake made by the notary."

Daniel on Negotiable Instruments, II, 140.

There was conflicting testimony on the point that in January, 1875, Britton & Koontz admitted Lambert's residence to be then on his plantation near Natchez. (Fols. 25, 32.) Even if the statement of Niccolls is cor-

rect, it does not show an admission of any knowledge as to the residence of Lambert on the 8th April, 1875. In January, 1875, the parties did not stand in the relation of principal and agent, and Britton & Koontz were under no duty to remember on April 8, 1875, any fact communicated in January, 1875.

When the second note was sent for collection, Niccolls knew of the protest of the first note, and is to be presumed to have known all the facts connected with its presentment. In January, 1875, he knew of Lambert's residence at that time. With this knowledge in his possession, he makes no complaint, but sends for collection another note. Is not this conduct equivalent to instructions to Britton & Koontz to pursue with the second note a like course to that which they took in regard to the first? Is not this conduct, taken in connection with the instructions he sent, positive proof that he intended Britton & Koontz to present the note only in Natchez?

Niccolls paid the protest fee on the second note and made no complaint of the conduct of Britton & Koontz until this suit was begun, in 1878.

It is submitted that on a view of the whole evidence, the contract of Britton & Koontz was to present the notes in Natchez. Lambert, the maker, having been shown to be absent from Natchez, there has been no breach of that contract.

II. The court erred in charging that it was the duty of the holder of the notes—~~that it was necessary~~ in order to charge the endorser—to present the note to the maker for payment. (Fol. 40.)

If the court below was correct in holding that the duty of Britton & Koontz, as agents for collection, was co-extensive with that of Niccolls, the holder, yet there was no breach of the contract, because it was not the duty of the holder to present the note out of Natchez.

The charge overlooks the decisive fact in the case, viz.: that the notes bear date at Natchez.

In regard to the duty of presenting a note bearing date at a particular place, two rules have been laid down:

1. That the place of date is *prima facie* the place of payment.

2. That the place of date is absolutely the place of payment.

The first of these views is taken by the following authorities:

"Whether or not due diligence to find the maker of a note *at the place where it is dated*, will be sufficient, has been debated. The place of date is *prima facie* evidence that it is the place of the maker's residence and place of business; and it is sufficient, we should say, to charge an indorser to have the note in that place at the time of maturity, and to make proper inquiry after the place of the maker's residence or place of business, provided that the holder does not know that his residence is elsewhere. And if it were proved that the maker resided elsewhere, it would not devolve upon the holder the burden of showing that he made inquiries as to his residence. This doctrine is sustained by high authority in America, and is that adopted in Scotland; and it seems to us correct, notwithstanding that there are cases in which a contrary view is taken, and that it has been criticised by an eminent author. It is true that the execution of a note, and the dating of it at a particular place, does not make it necessarily payable there; and this is the ground on which Professor Parsons bases the opinion that due diligence is not exercised in presenting it there without inquiry; but the question seems to us not one as to the contract of payment, but simply as to the likelihood of the maker's whereabouts. And in the absence of other information, it seems reasonable to presume that he will be found at the place where he executes his business paper, and that if it had been intended that

it should be payable elsewhere, it would be so expressed on its face."

1 Daniel on Negotiable Instruments, p. 473, § 640.

Chancellor Kent states the rule thus:

"If there be no particular and certain place identified and appointed, other than a city at large, and the party has no residence there the bill may be protested on the day, *without inquiry*, for that would be an idle attempt. The general principle is that due diligence must be used to find out the party and make the demand, and the inquiry will always be whether, under the circumstances of the case, due diligence has been used. * * * The presumption is that the maker resides where the note is dated and that he contemplates payment there. But it is presumption only, and if the maker resides elsewhere within the State where the note falls due, and that *be known* to the holder, demand must be made at the maker's place of residence."

Kent, Vol. 3, ch. 44, p. 95.

The rule here declared obtains in Massachusetts.

"This is an action brought by indorsers against a prior indorser to recover the contents of a promissory note. At its maturity the holder placed it in the hands of a notary public, who, by his direction, went with it to the place of business which the maker formerly occupied in the city of Boston, and then made inquiry for him, in order, if he were found, to present it to him for payment. He was not found, and no demand of payment was made. The defendant insists that he is not liable as indorser, and that this action cannot be maintained. The note is dated and was made at Boston, where the maker then was on a visit for a temporary purpose only. He then, and has ever since, resided at Port Lavacca, in the State of Texas, where he had his only place of business. At the trial no evidence was pro-

duced to show whether the plaintiff, or any of the subsequent holders of the note, knew that the maker's residence and place of business were in Boston or elsewhere; *there was no evidence whatever on that question.* * * * The defendant insists that the plaintiffs ought to have been required, if they would avail themselves of that rule, to show affirmatively that both they and all the subsequent holders of the note were ignorant of the fact that the maker of the note had no residence or place of business in the city of Boston. This is not so. The presumption is, as has been before stated, in the absence of all other evidence upon the subject, that the residence of the promisor is at the place where the paper to which he subscribes his name is dated. Either party may controvert this presumption, and overcome it by proofs introduced. But no evidence to the contrary having been laid before the court, this presumption is to stand."

Smith *vs.* Philbrick, 10 Gray, 252.

The same rule prevails in Maryland and Vermont.

Staylor *vs.* Ball, 24 Md., 196.

Blodget *vs.* Duryea, 32 Vt., 361.

The other principle, viz., that the place of date is absolutely the place of presentation has been adopted by the courts of England and New York, and by this court.

A bill drawn upon a person at a particular place accepted by him generally is payable at that place.

Hine *vs.* Allely, 1 N & M., 433.

Also Burton *vs.* Jones, 1 M. & Gr., 83.

Also in New York.

"In such case (the note being dated at a place and payable generally) the note must be presented and payment asked for at the place of business therein of the maker, if he has one, and if he has no place of business,

then at his place of residence, and if he have neither place of business nor residence, then if the holder of the note is at the place where it is in general made payable, on the day of payment, with the note, ready to receive payment, it is sufficient to constitute a presentment and demand."

Mayor *vs.* Hibscher, 47 N. Y., 270.

In a recent case the doctrine contended for was laid down by this court.

Cox *vs.* National Bank, 100 U. S., 715.

In this case the drawer, living in Kentucky, drew his bill, addressing it to "Cox & Cowan, New York." Cox & Cowan accepted it generally. They, at the time and at the date of maturity, resided in Kentucky, and had their place of business there; and accepted the bill in Kentucky; and the *holder had knowledge of these facts.* Search for the acceptors was made only in New York.

On these facts the court said:

"The bill is addressed to Messrs. Cox & Cowan, New York, as drawees, and is by them accepted, without explanation or condition, from which it follows as a reasonable inference that they accepted the bill as if they were at the time in New York; and having so accepted it without explanation or condition the legal construction of the instrument is that it became payable when it fell due at the place designated by the address as the place where the acceptance took place."

The present case differs from that cited only in facts which make it a stronger case for the application of the rule. One who dates his promissory note at a particular place makes a more distinct admission as to his residence than one who accepts a bill addressed to him by another at a particular place. In the case cited the whole transaction took place in Kentucky, and the bank knew that.

It is submitted that the case of Cox *vs.* The Bank is decisive of the present case.

Whichever of the principles shown to have been held by different courts is adopted here, the ruling below will appear to be erroneous, for the circuit court held it to be absolutely the duty of the holder of the note to seek the maker wherever he was.

The refusal to grant the first prayer of the plaintiff in error was in effect a refusal to hold that the place of date was even *prima facie* the place of payment of a note.

The proof shows that the holder had the note in Natchez at the date of maturity; he performed all his duty under his contract.

III. It was clearly error to submit the point of "due diligence" to a jury as a question of fact.

"It seems at this day to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. This is certainly best calculated to have fixed (or) uniform rules on the subject, and is highly important for the holders of commercial paper.

Bank of Columbia *vs.* Lawrence, 1 Pet., 583.

This doctrine is affirmed in Diekins *vs.* Beal, 10 Pet., 581.

Harris *vs.* Robinson, 4 How., 345.

In the latter case it was held that there was due diligence, although the notary had made no inquiry of the holder of the note as to the residence of a party to it.

This doctrine is the law of Maryland.

Staylor *vs.* Ball, 24 Md., 196.

In the latter case the maker of the note conducted a large factory on a prominent street in Baltimore. The notary looked into the directory and made inquiry at the post of-

fice and exchange for the maker without success. This was held to be due diligence.

The diligence in the present case will be found equal to that held to be sufficient in the cases cited. It is difficult to see what more should have been done in that way.

JAMES LOWNDES,
Att'y for Plaintiff in Error.

IN THE

Supreme Court of the United States.

October Term, 1879.

—o—

A. C. BRITTON, Surviving Partner, &c., Plaintiff in Error.

vs.

ROBERT NICCOLLS, Defendant in Error.

—o—

Error to the Circuit Court of the Southern District of Mississippi.

—o—

Brief of

A. H. HANDY,

For Plaintiff in Error.

JACKSON, MISS.:
MARTIN & WINKLEY, BOOK AND JOB PRINT.,
CAPITOL STREET.
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Action on the Case.

—o—

Error to the Circuit Court for the Southern District of Mississippi.

—o—

BRIEF FOR PLAINTIFF IN ERROR.

—o—

Abstract of Record.

Action on *the case,* by defendant in error against plaintiff in error, as the surviving partner of the banking firm of Britton & Koontz, late partners in the business of Banking, at Natchez, in the State of Mississippi. Declaration alleges, in substance, that prior to the 27th day of April, 1874, and 27th day of April, 1875, respectively, the plaintiff was the

legal holder and owner of two promissory notes, bearing said respective dates, made by one John J. Lambert, one in the following form, to-wit:

"$3666 66. NATCHEZ, April 24, 1872.

"Two years after date, I promise to pay to my own order, three thousand six hundred and sixty-six 66-100 dollars, for value received, with interest from date, at the rate of eight per cent. per annum.

JOHN J. LAMBERT."

Endorsed as follows: "Pay the order of Jas. M. Reynolds.

JOHN J. LAMBERT."

"Pay to John Fleming, or order.

J. M. REYNOLDS."

"Pay to J. S. Emert, or order, without recourse on me.

JOHN FLEMING."

"Pay to R. Niccolls, or order.

J. S. EMERT."

The second of said notes was of the same tenor and date, and for like amount, as the first, but payable three years after its date, with interest as the former, to the same order as the former note and endorsed by the same persons above stated.

That before the maturity of said respective notes, said Niccolls, as holder, delivered said notes to said Britton & Koontz, bankers, at Natchez, for collection, and for presentment to the maker, at maturity, for payment, and that if not paid by him, that they should severally be duly and legally protested for non-payment, and notice given to the endorsers; which said Britton & Koontz undertook to do, with proper care and diligence, and for usual compensation; and said notes were taken by said plaintiff in the usual course of business, before maturity and for a valuable consideration.

That on 27th of April, 1877, plaintiff recovered judgment against said maker Lambert, on the balance due on said notes,

and issued execution thereon, which was returned "nulla bona."

That said Britton & Koontz failed to perform their duty in the premises, and failed and neglected duly and legally to present or cause to be presented to said maker Lambert, for payment, said notes, as they respectively became due, and to cause the same to be protested for non-payment, and to cause notices thereof to be forwarded to the endorsers, but so carelessly, and negligently proceeded therein, that no legal presentation of said notes, at their respective maturity, was made to said maker for payment thereof; and that on the 29th of March, 1876, he commenced his action in the Circuit Court of the United States for the District of Kansas against said endorsers, Jas. M. Reynolds, and J. S. Emert, to recover judgment on said notes, and recovered judgment against said Emert, by default, who was and is insolvent; that afterwards, on the 5th of December, 1876, a judgment was rendered in said cause, in favor of said Reynolds, and against said plaintiff, because of the failure of said Britton & Koontz, to perform their duty in the presentation of said notes for payment, and protest thereof, and for transmission of notices, &c.

Record. MS., pp. 1–9.

The defendant below pleaded, among other things, the *general issue*. Record, p. 12. On this, issue was joined and the trial was had, (Record, p. 19, (MS.) and resulted in a verdict and judgment for the plaintiff below; to which the defendant sued out this writ of error.

First Bill of Exceptions.—Record, (MS.) p. 22.

On the trial below, the plaintiff offered in evidence, the two promissory notes mentioned in the declaration in the words and figures as therein set forth, and the endorsements thereon.

To the admission and reading of which in evidence, the defendant objected, unless the plaintiff should first prove the

signatures and execution of said notes, of the maker and endorsers thereof; which said plaintiff declined to do. But the Court overruled said objection, and allowed the plaintiff to read in evidence said notes and endorsements, without any proof of the execution thereof by said makers, and of the signatures of said endorsers, or either of them, remarking that, if in the further development of the evidence, he found it error, he would announce it; but which was not done. To which ruling and allowance, the defendant duly excepted, and his exception was allowed and duly signed by the Court.

Record, (MS.) pp. 22–23.

Second Bill of Exceptions.—Record (MS.) p. 24, *et seq.*

TESTIMONY FOR PLAINTIFF.

The plaintiff caused to be sent to Britton & Koontz, bankers at Natchez, the promissory note set forth in the declaration, due 27th of April, 1875, (1874,) for collection by said bankers, if paid, and, if not paid on presentment, for protest and for notices of non-payment to the endorsers; and that the note payable 27th of April, 1875, was transmitted by the plaintiff himself, to said bankers, with written directions to collect the same, if paid, and if not paid, to be delivered to the protesting officer for protest, and to give notices to the endorsers, in order to charge them—that said notes were received by said bankers in due time to attend to these directions; that the maker of said notes, Lambert, had, at the maturity of both of said notes, no domicil or place of business at Natchez, where said notes bore date, but resided, and had his domicil, on a farm about twelve or fifteen miles from Natchez, and in the same county. It was further shown by the testimony of the plaintiff, as a witness in his own behalf, that before the maturity of the note due 27th of April, 1874, he had no knowledge of the maker's residence, and that about January, 1875, said maker, Lambert, was residing on his plantation in the country, about twelve miles from Natchez, in the

same county, but that his continuing to reside there was conditional, and that plaintiff did not know, at the time of forwarding the note to defendant of the maker's residence. He further testified, that in an interview about January 1875, between Britton & Koontz, and plaintiff, the residence of Lambert was admitted by them and plaintiff, to be on Lambert's plantation. Record, (MS.) p. 24-25.

Plaintiff also read in evidence, the deposition of the Notary who protested said notes, and his protests thereto returned and attached, and by him to Britton & Koontz, who returned the same to plaintiff, which deposition showed, amongst other things, that one of the members of said firm of Britton & Koontz, handed said notes to said notary, as a duly appointed officer of the law, at the close of banking hours, on the respective dates of their maturity, for the purpose of said notary demanding payment, and in the event of non-payment, for protest by him, without any special instructions from the firm as to what he was to do in the premises, further than that said notes were handed to him to demand payment, and in the event of non-payment, to protest them and give notices of non-payment, to the endorsers, at specified places; that said notary knew at said times, that Lambert, the maker, resided about eighteen or twenty miles outside of the city of Natchez, on his plantation in Adams county—that said notary knew Lambert had not a place of residence or business in Natchez, and went to the Post Office, City Hall and Court House, the most public places in Natchez, and enquired for John J. Lambert, but could not find him to demand payment of said notes—that he protested the notes and gave notices to the endorsers of their non-payment—that in his efforts to make presentment for payment, he acted upon his own opinion, and without instruction from Britton & Koontz upon the matter, and because he considered that said notes, being dated at Natchez, and no place of payment being stated therein, the

signatures and execution of said notes, of the maker and endorsers thereof; which said plaintiff declined to do. But the Court overruled said objection, and allowed the plaintiff to read in evidence said notes and endorsements, without any proof of the execution thereof by said makers, and of the signatures of said endorsers, or either of them, remarking that, if in the further development of the evidence, he found it error, he would announce it; but which was not done. To which ruling and allowance, the defendant duly excepted, and his exception was allowed and duly signed by the Court.

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same county, but that his continuing to reside there was conditional, and that plaintiff did not know, at the time of forwarding the note to defendant of the maker's residence. He further testified, that in an interview about January 1875, between Britton & Koontz, and plaintiff, the residence of Lambert was admitted by them and plaintiff, to be on Lambert's plantation. Record, (MS.) p. 24-25.

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place of payment was in law, at Natchez, and not at the maker's domicil outside of Natchez, and that it was not his duty to go to his domicil—that he knew that Lambert did not reside then at Natchez, and had no place of business there, but does not know that B. & K. knew this, but believes they did not, and that he never informed them of the fact. Record, (MS.) pp. 25, 26, 27.

Plaintiff also proved by some six witnesses residing at Natchez, and in Adams county, Mississippi, that said Lambert did not reside, or do business, in Natchez, but on his plantation in said county, at the time of maturity of said notes, but they could not state whether his said residence was known generally in Natchez. Some of said witnesses stated that he had relations then in Natchez, who knew the fact of his residence in the country, outside of Natchez, and that he traded in Natchez, bought goods and sold cotton there, but could not state whether Britton & Koontz knew the same.

It was proved by Lambert that he executed and endorsed the notes, and evidence was given to prove, or tending to prove the other endorsements on the notes, and that his residence on his plantation was generally known.

It was admitted, that after the maturity of the notes, Lambert was sued and judgment rendered thereon, and that an execution thereon was returned "nulla bona," and that a suit against Emert, the endorser, a judgment by default was rendered, which was returned "nulla bona," and that in a suit of the present plaintiff against Reynolds, the first endorser, a judgment was rendered in favor of Reynolds, on the ground that due presentment of said notes had not been made to said maker, Lambert, by reason of which said endorser had been discharged, and that if judgment thereon had been rendered against said endorser, the plaintiff's money might have been made thereon by execution. There was proof showing, or tending to show, that Lambert knew Britton & Koontz from his childhood, and that Britton & Koontz knew that

Lambert, at the maturity of said notes, had not a place of business in Natchez.

TESTIMONY FOR DEFENDANT.

On the part of defendant, several witnesses, residents of Natchez, prominent citizens and practising lawyers there, testified to the effect, that they did not think it was well known in Natchez, at the times of the maturity of said notes, that said Lambert resided on a plantation in Adams county; that he was generally but little known in Natchez, as residing on said plantation; and that said witnesses' acquaintance with him was slight. That said witnesses had been for many years intimately acquainted with the members of the firm of Britton & Koontz, and that the character of both of them for intelligence, diligence and fidelity in all matters pertaining to the presentment, protesting, &c., of commercial paper was very high in the community, and that of the partner Koontz, who had charge of such matters in his bank, when such paper was placed there, for such purposes, was distinguished—that the established custom of their bank, when such paper was placed there for collection, was to place the same in the hands of a regular notary, as an officer of the law, for presentment, protest and notice to parties sought to be charged, when the same was unpaid at maturity, and that this was their custom in regard to paper owned by them as well as such as belonged to others.

Record (MS.) pp. 29–30.

Defendant Britton testified as a witness for defendant, that his bank received the notes before maturity, in April, 1874 and 1875, for collection, and if not paid at maturity, to be protested by a protesting officer, and notices given to the endorsers; and not having been paid at maturity, were severally handed by their Mr. Koontz to Hussey, a regular notary, for presentment, to the maker and if not paid thereon, for pro-

test, notices to be sent, &c.—that no information as to the residence of the maker, was ever given, by writing or otherwise, and witness did not know where it was—that it was always and then the custom of the firm to give notice to the requisite parties of the amount and date of maturity, of paper, whether belonging to the firm or to others, held by the firm, by placing said notices in the post-office, addressed to them, a reasonable time before such paper became payable, and if payment was not made at maturity, then to place such paper in the hands of a notary public for presentment, protest, &c. On cross-examination, witness stated that he did not know the residence of Lambert in 1874 or 1875, and does not think he was well known to the banking house of Britton & Koontz—that he finds by their books, that a note sent them for collection on April 27, 1873, from Bloomington, Illinois, was paid and proceeds remitted to the bankers in Illinois, who sent it; but does not know what said note was given for; and finds, from examination of the books, that the bank made one collection from Lambert on 27th of April, 1873, but does not find how or by whom it was paid, and finds by his books, that on 26th April, 1873, Lambert drew a check on the bank for $496, which had been placed to his credit in June, 1872—has no recollection of any personal transaction with him—that in 1874 and 1875, said bankers gave all notes requiring protest, &c., to Notary Hussey, then a regular notary public—that witness made no inquiry of the sheriff, or tax assessor of Adams county, to learn the residence of Lambert in 1874 or 1875—that defendant's invariable custom was, to have all unpaid notes and drafts protested, unless otherwise instructed.

In regard to the statements of plaintiff, in his deposition, as to Britton & Koontz's admissions in January, 1875—that Lambert's residence was then on his plantation in Adams county—said Britton testified, that he had no conversation with plaintiff about January, 1875, nor at any time, in relation to these

notes here in question, or in relation to said Lambert, or his residence, and he believes that no such admission was made by his partner, Koontz, as to Lambert's residence; and he annexed to his deposition a copy of a letter of witness, as surviving partner of Britton & Koontz, dated 17th of April, 1876, and addressed to the attorneys of plaintiff in the suit in Kansas against Reynolds, in answer to a letter written by said attorneys, at the instance of said plaintiffs, for the purpose of obtaining evidence in relation to the presentment of said notes to said Lambert, to be used in that suit—that said letter of witness states, that the business of said bankers, as to the protesting paper, &c., in their hands for collection or protest, when necessary, was always attended to by his deceased partner, Koontz, who gave particular attention to it, as belonging to his department of their business—that Mr. Koontz spoke to witness and asked him if he knew where Lambert resided, remarking that the demand must be made at his domicil, if he had any; to which witness replied that he knew nothing about him; that Koontz then made the inquiry of several persons who came into the bank, and none of them could give him any information about Lambert—that Koontz then left the bank for the purpose of trying to learn where Lambert lived, and that he told witness he could learn nothing about him, and that the notary would have to comply with the law in such cases, and present at several of the most public places—that witness is certain that Koontz made diligent efforts to ascertain Lambert's place of residence, and that they were unsuccessful—that witness never knew where Lambert resided, and that the above facts stated in the letter, show that Mr. Koontz did not know it, and could not find where it was after diligent inquiry. Witness further stated that he never had any interview or admission as to Britton & Koontz' knowledge of Lambert's residence, as stated in the deposition of plaintiff, and does not believe that Mr. Koontz ever heard of any such interview or admission.

On cross-examination witness testified, that when the notes were handed to Hussey, the notary, it was with the customary instructions, to present them to the maker and demand payment, and to protest them if not paid. The bank's custom was to put notices in the post office several days in advance of the maturity of the paper, notifying the parties of the amount and maturity of the paper. Witness asked no information of plaintiff's residence; never knew of any instructions on the subject being given—the notes being dated at Natchez, the presumption was that the party lived there—in such cases it is not customary to make inquiries as to the residence of the maker, and if such instructions had been given by the holder, they would have been followed—that neither the witness, nor any one in his employ, presented the notes to Lambert for payment—they were handed to the notary for that purpose on the days they respectively fell due.

Record (MS.) pp. 30–35.

Stratton and Koontz, Jr., witnesses for defendant testified, in substance, that they were the only employees in defendant's banking house at the time of the maturity of the notes in question—that they, nor either of them, were notified at either of these times, where the place of residence or of business of Lambert was, and do not know that Britton & Koontz, or either of them, had such knowledge—that it was their custom, when any paper was received by them with any directions where such paper should be presented, for payment, to inform these witnesses, as their note clerks, and they were directed to follow such instructions, and no such special instructions were given as to these notes—that it was their custom to have notices to the parties bound to pay any paper, put in the post office, notifying them of the maturity and amount of such paper several days before maturity, and the same was their custom in regard to paper belonging to themselves; and if such paper was not paid at maturity, it was

their general custom to place it in the hands of a notary for presentment and protest. Record (MS.) pp. 35–36.

It was further proved by defendant, that the note due 27th of April, 1874, was received for collection by Britton & Koontz from a banking house in Bloomington, Illinois, to whom it had been endorsed by the plaintiff—that Britton & Koontz received it on the 23d of April, 1874, and when they had returned the protest to said bankers in Illinois, said last named bankers paid the protest fees thereon, which had been paid by Britton and Koontz—that the note due 27th of April, 1875, was received by Britton & Koontz in a letter from plaintiff dated Bloomington, Illinois, April, 8, 1875, for collection, and if not paid, requesting them to "*have it protested and if possible to have the protesting officer* to ascertain whether or not Mr. Lambert has a place of business or residence in Natchez;" also requesting them to have notices of protest sent to the endorsers at specified places—that this latter note was not paid at maturity, and was thereafter returned, with notarial protest annexed, to plaintiff, who paid to Britton & Koontz the protest fees.

Record (MS.) p. 37.

This being the substance of all the evidence in the case, the defendant prayed the court to instruct the jury as follows, to-wit:

1st. "If the jury are satisfied from the evidence before them, that the two notes of Lambert in question were sent or delivered by Niccolls, or his agents, to Britton & Koontz, in order to collect the money if paid, and if not paid, then to have said notes protested legally—that said Britton & Koontz did not know the place of residence or of doing business, of said Lambert, and, upon making diligent inquiry therefor, in the city of Natchez, were enable to learn the same, and thereupon, at their maturity, handed said notes to Hussey, who was the Circuit Clerk of Adams county, Mississippi, for the

4th. "If the proof shows that Britton & Koontz used reasonable diligence to ascertain the residence, or place of business, of Lambert, and failed to ascertain the same, they were excused from making the demand of payment themselves or from communicating such information to Hussey, the notary. The question of diligence is a question of fact to be determined by you from the evidence. Reasonable or due diligence is such as a prudent man will exercise in his own affairs—such as inquiring of those who would most likely know the place of residence of Lambert, the burthen of proving which is on the defendant."

Record (MS.) p. 42.

5th. "If you shall find from the evidence that Britton & Koontz performed the duties required of them by the law, in regard to said notes, as stated in these instructions, you will in your verdict find for the defendant." Ib. p. 42 (MS.)

6th. "But if you shall find that they failed and neglected, to discharge such duty, and shall further find from the evidence, that in consequence of such failure and neglect, the endorser Reynolds was discharged from liability on his endorsements upon said notes, and that he was solvent, and that the amount due thereon could have been recovered from him by due process of law, then your verdict should be for the plaintiff for the amount shown to be due upon said notes, up to the present time."

Record (MS.) p. 42–43.

To the giving of which said six instructions *severally*, the defendant duly excepted at the time, and the same was signed in due form.

Record (MS.) p. 43.

Assignment of Errors.

And the said plaintiff in error assigns the following errors in the record, to-wit:

I. The court erred in overruling the objection of the

defendant below, to the offer of plaintiffs attorney, on the trial, to read in evidence to the jury, the two promissory notes mentioned in the declaration, unless the plaintiff would first prove the signatures and execution of said notes of the maker and endorsers thereof, and in allowing said notes and endorsements to be read in evidence by the plaintiff, without any proof of the execution thereof by said maker and endorsers, as shown by the first bill of exceptions.

Record (MS.) pp. 22–23.

II. The court erred in refusing to give to the jury the instruction marked 1st, prayed by the defendant below, and excepted to in the *second* bill of exceptions, as above stated.

Record (MS.) p. 38.

III. The court erred in giving to the jury the instructions numbered 1st, 2nd, 4th, 5th, 6th, which were *severally* excepted to by plaintiff in error, as above stated.

Record (MS.) pp. 40–43.

ARGUMENT FOR PLAINTIFF IN ERROR.

I. The ruling of the court shown by the first bill of exceptions, Record (MS.) p. 22, was manifest error.

The action was *case*, for negligence of duty by defendant in not having the notes presented for payment to the maker; to which the *general issue* was filed. This put in issue all the averments of the declaration, and devolved on the plaintiff the proof of all that were material.

By the rules at common law, the plaintiff would have been compelled to prove the execution of the notes by the maker and the endorsers, even in an action *founded on the notes*, against the maker, or endorsers. But this rule was modified as to such actions by a statute of Mississippi, which is in the following terms:

"§683. In suits founded on any written instrument set forth in the pleading, it shall not be necessary to prove the signatures or execution thereof, unless the same be denied by a special plea, verified by the oath of the party pleading the same; and in no case shall it be necessary to prove any written signature, the execution of any instrument, or any identity or names of persons or description of character, or the persons composing any firm or partnership, which may be set forth in the pleadings, unless the same be denied by special plea, verified by oath as aforesaid; and the like rule shall prevail as far as may be applicable, in all cases where any wri-

ting is pleaded or set up by the defendant, or any signature, identity or names of persons, description of character or partnership set forth in his pleading,"

Rev. Code, Miss., 1871, p. 143.

This rule plainly has reference to "suits *founded on any instrument of writing*," signed, or executed by a party sued, or to any defense set up by reason of such an instrument, by the defendant against the plaintiff; as, for instance, a set off. It clearly has no application to a suit, not founded on an instrument of writing, signed or executed by defendant, and by the force of which the defendant is not sought to be charged, or by virtue of which he does not seek to charge the plaintiff, as on a specific obligation. It has no application to a suit in which the written instrument, *made by another*, is set forth in the pleading, as an incident, or by way of inducement, to the right of action set forth in the declaration. For how could the defendant deny by a special plea, "verified by his oath," the signature or execution of an instrument of writing not alleged to have been executed by him, but made by a stranger?

Here the suit was not *founded on* the notes, but upon an alleged *collateral duty* of the defendant, which proceeded in part from the notes, and from acts of negligence of his duties in relation to them. It sounds in *tort*, and not in contract founded on the instruments as creating obligations *per se* on the defendant. As well might it be said, that—in an action of ejectment, in which the plaintiff saw fit to set out and deraign his title, by certain conveyances alleged to have been executed by sundry named persons, by which his right of action accrued—the averment of the execution of said conveyances by the named persons, must be held to dispense with proof of their execution at the trial, where they were not denied "by special plea of the defendant, verified by his oath." And so of any other action in which the instru-

ment of writing is set forth in the pleading as merely collateral to the right and remedy claimed.

The ruling in question, manifestly proceeds upon a misconception of the statute relied on to support it, and has never been sanctioned by the courts of Mississippi. Both its terms and its object forbid its being extended beyond actions *founded on instruments of writing, signed and executed by the defendant in the action.*

Nor is this error cured by the remark of the learned judge, that if he found it error, in the subsequent developement of the evidence, he would announce it, since that was not done, and the notes, without proof of execution, went in evidence to the jury and that error was uncorrected. Nor is it cured by the statement in the bill of exceptions, (Record (MS.) p. 28,) that "evidence was given to the jury to prove, or tending to prove, the endersements on the notes." For, 1st. That evidence, or its substance, is not stated in the bill of exceptions, though the 2d bill of exceptions purports to state the substance of the whole evidence. 2d. If the position above taken in behalf of the plaintiff in error was correct, the admission of the notes in evidence, without proof of signing and execution by the endorsers, was positive *error in law*; which, upon well settled principles, vitiated the verdict on the ground of the admission of illegal evidence; and that error was not obviated by the suppletory evidence suggested; but the improper admission of the notes, without proof, is to be presumed to have had its prejudicial effect upon the jury, as dispensing with any proof of the signing or execution of the notes by the endorsers. Under the ruling of the court upon the objection, this alleged suppletory proof was wholly unnecessary, and, hence, cannot be supposed to have had any effect upon the jury, because the court's decision was that the notes were evidence of signing and execution without any proof thereof, and they were accordingly read in evidence.

It must, therefore, be taken that the error in allowing the notes to be read in evidence, without proof of their execution, had its injurious effect upon the jury, upon that point, and that that error was not cured by any alleged suppletory proof, especially when the substance of that proof is not shown by the record. For if that error be admitted, it must appear that, in the progress of the cause, that ruling could have worked no injury to the exceptant or that it becomes immaterial. Greenleaf vs. Birth, 5 Peters, 132; Phillips vs. Preston, 5 How., 278. And if that be not clearly shown, the presumption of injury from the error, must prevail.

II. The second assignment of error is well taken.

The first instruction prayed by plaintiff in error should have been given.

The record clearly shows, that the notes in question were delivered to Britton & Koontz, bankers, for collection, and if not paid, then to have them protested legally, by a protesting officer; the notes bearing date at Natchez, and not being payable at any stated place; that the bankers did not know, and were unable, upon making diligent inquiry therefor in Natchez, to learn the place of residence, or of doing business, of the maker—and thereupon, at their maturity, handed them to a regular notary public for presentment to the maker for payment, and to be protested, in case of their non-payment, and notices thereof given by said notary to the endorsers. And this instruction prayed that if the jury were satisfied of these facts, from the evidence, the bankers were not liable for negligence in the premises, and that they should find for the defendant.

The only point stated in it about which any question could be raised, was whether the bankers—having received the notes for collection, and not knowing the domicil of the maker, or his place of business, and being unable to ascertain the same after making diligent inquiries—were justified in

handing them to a regular notary public, for presentment and, in the event of non-payment, for protest, and notices to be sent by him to the endorsers.

And that question is settled by numerous cases and upon the soundest principles, in Massachusetts, Connecticut, Illinois, Pennsylvania, Maryland, Louisiana and Mississippi.

Fabens vs. Mercantile Bank, 23 Pick., 332.

Warren Bank vs. Suffolk Bank, 10 Cushing, 582.

East Haddam Bank vs. Scorvier, 12 Conn., 314

Alton Ins. Co. vs. Alton City Bank, 26 Ill., 243.

Bellmire vs. Bank United States, 4 Wharton, 105; 1 Miles, 173.

Jackson vs. Union Bank of Maryland, 6 Harr. & John. 146; 8 Md., 530.

Baldwin vs. Bank of La., 1 La., Ann., 13.

Frazier vs. New Orleans Gas Co., 2 Rob., (La.) 294.

Agricultural Bank vs. Commercial Bank, 7 Sm. & Mar. (Miss.) 592.

Commercial Bank vs. Tiernan, 7 How., (Miss.) 648.

Bowling vs. Arthur, 34 Miss., 41.

The principal reason justifying such course, is that the notary is an independent public officer appointed by law, and is bound and empowered by law to act as such, in the presentment and protesting of commercial paper, and is *not the agent of the Bank*, so as to make it liable for his neglect. And after receiving such paper for presentment, protest, &c., the notary becomes *the holder* of it, and is entitled to receive the contents of it from the parties.

Byles on Bills, 2 (margin.)

A somewhat different rule is held in South Carolina, in Thompson vs. Bank of S. C., 3 Hill, 77. But that was in relation to the protest of a *promissory note* by a notary, which was held to be incompetent, because such paper was not protestable by the law merchant, and its protest was not authorized by any statute of South Carolina.

In Mississippi there is a statute authorizing, and making it the duty of notaries public, to make presentment of promissory notes, and to protest them for non-payment, and to make a public registry thereof, which is made evidence. See act making full provisions thereupon. Pamphlet Acts, 1872, ch. 120, p. 147, Laws of Mississippi.

And the rule held in the above cited cases is sanctioned in the work of Shearman & Redfield, on Negligence, 273–274.

This instruction, as asked, has peculiar force and application to the case from the hypothesis stated in it, to-wit, that the jury must be satisfied, from the evidence, that the bankers did not know the place of residence, or of doing business, of the maker, and, upon making diligent inquiry therefor in the city of Natchez, where the notes bore date, were unable to learn the same. In any just view of the duties of the bankers, all that they were possibly required to do, in the circumstances appearing, was to use reasonable diligence to ascertain the maker's residence or place of business, and that was properly submitted to the jury in the instruction asked. If they used such diligence unsuccessfully, they were, in any correct view of their duties, clearly justified in handing the notes to a notary public—a public officer of the law—for the purposes of presentment, &c., which they had been unable to perform after due diligence bestowed thereupon, especially after notice had been given to the maker as to the amount and maturity of the notes, which is shown by the evidence, and that he afterwards made default in payment. Chitty on Bills, by Hulme 453, (margin) and notes, 13 Amer., (from 9 London,) edit. It was all that could be done, under the circumstances as hypothetically stated in this instruction as asked, and more than they were required to do as above shown. After failing in their efforts, they might have declined to do more. Byles on Bills, 147, note 1, and

cases there cited. But they used extraordinary diligence by calling in the services of a notary to do what they had been unable to do.

The instruction as asked was applicable to the facts in proof, and it covered all the material points of law presented in the case, and necessary to be considered by the jury, in a clear, connected and succinct form. We submit that its refusal by the court was clearly error.

III. The Court erred in giving to the jury the first instruction, Record, (MS.) p. 40, which is as follows:

"1st. If you are satisfied from the proof, that the firm of Britton & Koontz, as such bankers, received the notes mentioned, for collection, it thereby became their duty to do and perform such acts as the law required, to charge the endorsers upon the notes, and render them liable for the payment of the sums due thereon, which was, to present them for payment to Lambert, the maker, on the last day of grace, which was the 27th days of April, 1874 and 1875, respectively, and upon non-payment, to give notice thereof to the endorsers; provided, however, that said Britton & Koontz did not do some other act, or were not otherwise released from the obligation to make such demand and give such notice."

1. This instruction contains the fundamental error, that it was the duty *of the bankers*, after receiving the notes for collection, to present them at maturity to the maker for payment, and, upon non-payment, to give notice thereof to the endorsers. It excludes the idea that these duties, or either of them could be performed by any other than Britton & Koontz, at their request, or that they could cause them to be done by another. and especially that they could not be performed by a Notary Public. It had special reference to the performance by that officer; for it was the sufficiency of his acts which formed the principal subject of the controversy.

We have above shown by numerous cases, that a bank

which receives a note for collection, and places it in the hands of a notary in time for demand and protest, is not liable on account of loss from the negligence of the Notary.

Warren Bank vs. Suffolk Bank, 10 Cushing, 582.

7 Sm. & Marsh. Miss., 592.

And it is laid down by Chitty, that the practice is, that the holder of bills or notes, himself, or *his agent*, presents the same for payment, on the day they fall due * * and if not paid, he sends the bill to a notary," &c. And if presented either by the holder, or some other person, if he be ill or absent, he should cause it to be protested. Forthis purpose, he should carry the bill to a notary, who is to present it again to the drawer, and demand payment, and protest it.

Chitty on Bills, 458 (margin) by Hulme, 13 Amer. edit.

The effective act clearly is the presentment and protest, by the notary, of the paper, of which he is the holder.

The obligation of the banker, receiving such paper for collection, is to present or *cause it to be presented*, for payment; and this, it is settled may be properly done even by the notary's clerk.

Chitty on Bills (margin) 459.

Commercial Bank of Kentucky, vs. Varnum, N. Y. Supreme Court, 1869.

A fortiori such presentment may be made and notice of nonpayment given to the endorsers, by a Notary Public, a regular officer of the law, and charged with those special duties.

Laws of Miss., 1872, ch. 120, p. 148, §9.

The propriety of this appears, not to be denied by any adjudicated case, and may be considered as beyond question.

Moreover, the statute, 1872, ch. 120, §9, made it the duty of the notary, protesting the notes, to make a full and true record in his register, required to be kept by him for that purpose, of all his proceedings in relation thereto, of the demand and presentment and whether notices thereof were given, to

whom, how and to whom, and where directed; and that such record should be evidence of the facts contained in it.

§12, p. 149.

The course of these bankers, therefore, was discreet, and beneficial to the plaintiff because the acts required were available for the plaintiff, by the notarial record kept by him, which was important to the plaintiff as evidence.

In addition to this it is shown by the record here, that the plaintiff, in transmitting the note due in 1875 to the bankers for collection, requested them, if it should not be paid, to have the *protesting officer* to ascertain whether or not Lambert, the maker, has a place of business or residence in Natchez, and to have notices of protest sent to the endorsers at specified places.

Record (MS,) p. 37.

This is also testified to by plaintiff.

Record (MS.) p. 24.

This clearly showed that the plaintiff intended that, in the event the note was not paid at maturity, the services of the notary should be availed of for presentment, protest and giving notice.

2. The concluding clause of this instruction leaves it entirely to the jury to determine what other act was done by Britton & Koontz, and whether they were otherwise released from the obligation to make such demand and give such notice. No direction is given to the jury as to what act would be sufficient in law, to release them from this obligation, but that matter is submitted wholly to their own notions, and it is impossible to know how they solved it. This is well settled to be error.

Munns vs. Dupont, 3 Wash. Cir. Court Rep., 31.

Broad vs. Ham, 5 Bing. (N. C.) 722.

Pangburn vs. Ball, 1 Wend. 325.

Master vs, Day, 2 Wend. 424.

Greenwood vs. Mills, 31 Miss., 467.

3. The court erred in giving the second instruction to the jury, Record (MS.) p. 40–41, as follows:

"The defendant, to excuse himself"—for not making presentment and demand of payment of the notes—"has offered proof that the notes were, upon the days they respectively fell due, placed in the hands of Hussey, a notary public, with instructions to present the same and demand payment, and, in default thereof, to protest the same, and give notice to the endorsers. If you shall find from the evidence, that said Britton and Koontz used due diligence in ascertaining the residence of Lambert, the maker of the notes, and placed the notes in the hands of Hussey, a duly qualified notary public, within a reasonable time for said Hussey to present them to Lambert and demand payment, upon the day the same fell due, as above stated, and at his residence or place of business, and gave to said notary all the information which they had, or might have obtained by reasonable diligence, of the place of his residence or business, such acts, upon their part, would exonerate them from the duty of making presentment and demanding payment by themselves or agent."

By this instruction, in order to exonerate the bankers from liability for non-payment of the notes, they were required to show not only due diligence, on their part, to ascertain the residence of Lambert, but that they gave to the notary, all the information which they had or might have obtained by reasonable diligence as to his place of residence or business.

It is clear, from the testimony, that the Bankers did not know the place of residence or of business of Lambert, Record, (MS.) p. 31, ib., 32-33, that diligent inquiry was made by them to ascertain his place of residence, Ib. 34, and that the notary made inquiry therefor at three of the most public places in Natchez. This shows sufficient inquiry, and the court should have so instructed the jury. 1 Parsons on Bills, 448, and notes. Franklin vs. Verbois, 6 La., 727. Duncan vs. McCullough, 4 S. & R. 481.

But the clause requiring the bankers to give the notary all information they had or could obtain on the subject of his residence, was clearly erroneous and calculated to mislead the jury under the state of the evidence. For, it is fully proved by the notary's testimony—who was a witness for the plaintiff—that *he knew* that Lambert, at the times, had no place of business or of residence in Natchez, and *that he resided on his plantation in the country.* Record, (MS.) p. 26. Thus it is shown that full information upon the subject was in possession of the notary, and that nothing which could have been obtained or given in relation to it by Britton & Koontz, was necessary to the notary, because he already knew it fully. It was unquestionably the duty of the court to direct the jury, that if they were satisfied from the evidence that the *notary knew the place of residence of Lambert,* when the notes fell due, and failed to present them there for payment, without the fault of the bankers, and from an erroneous idea of his duty in the matter, the bankers were not responsible for his failures.

This instruction was further erroneous in leaving it to the jury to determine the question of law, what constituted "due diligence," without any direction as to whether the particular facts, proved, were sufficient to amount to "due diligence" in law, or not, as is above shown; and it is clearly erroneous, in directing the jury upon the general question, that it was incumbent on the bankers to give information to the notary, about the performance of the duty of presenting the paper for payment and the mode of performing it, he being a public officer charged with that duty, and bound to know the mode of its performance—which is above shown. And this is especially true, as it is shown fully by the testimony, that the bankers were ignorant of the maker's place of residence or of business, and that the notary knew it.

3. The court erred in the following instruction, to-wit: Record, (MS.) p. 42.

"4. If the proof shows that Britton & Koontz used reasonable diligence to ascertain the residence, or place of business, of Lambert, and failed to ascertain the same, they were excused from making the demand of payment themselves, and from communicating such information to Hussey, the notary. The question of diligence is a question of fact to be determined by you from all the evidence. Reasonable or due diligence is such as a prudent man would exercise in his own affairs, such as inquiring of those who would most likely know the place of residence of Lambert, the burthen of proving which is on the defendant."

Several errors are contained in this instruction:

1. It leaves the entire question of "reasonable diligence" in the bankers, in their efforts to learn the residence, or place of business of Lambert, to the jury without any reference to the facts proved; as to the inquiries made at three of the most public places in Natchez, and without any directions as to the bearing of the particular acts proved to have been done by them as affecting the question of diligence.

2. It holds that it was the duty of the bankers to make efforts to learn the place of residence, or of business of the maker, and that they were not justifiable, being ignorant of such place, to place the paper in the hands of a Notary Public, to learn the place of payment, and to make presentment for payment and give notice to the endorsers of non-payment, though that course was clearly contemplated by the plaintiff's letter in evidence.

3. This latter error—ignoring the propriety of placing the paper in the Notary's hands for the performance of these acts—is also carried into the 6th instruction.

Record, (MS.) p. 42.

These instructions were duly excepted to *severally*, and since they are more or less connected together, though granted and excepted to, as *several* instructions, it has been consid-

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This instruction was further erroneous in leaving it to the jury to determine the question of law, what constituted "due diligence," without any direction as to whether the particular facts, proved, were sufficient to amount to "due diligence" in law, or not, as is above shown; and it is clearly erroneous, in directing the jury upon the general question, that it was incumbent on the bankers to give information to the notary, about the performance of the duty of presenting the paper for payment and the mode of performing it, he being a public officer charged with that duty, and bound to know the mode of its performance—which is above shown. And this is especially true, as it is shown fully by the testimony, that the bankers were ignorant of the maker's place of residence or of business, and that the notary knew it.

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Record, (MS.) p. 42.

These instructions were duly excepted to *severally*, and since they are more or less connected together, though granted and excepted to, as *several* instructions, it has been consid-

ered proper to present the evidence together, in the second bill of exceptions, in order to show the merits of the whole case applicable to the diffuse instructions granted by the court.

We humbly submit to the Court that these several grounds of exceptions, show manifest errors in the rulings of the court below, to the prejudice of the plaintiff in error; and that the judgment should, therefore, be reversed.

A. H. HANDY,
Of Counsel for Plaintiff in Error.

OFFICE SUPREME COURT U. S.
FILED
SEP 14 1880
JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT

OF THE UNITED STATES.

A. C. BRITTON, Surviving Partner, etc., Pl'ff in Error,

vs.

ROBERT NICCOLLS, Defendant in Error.

Error to the Circuit Court of the United States, for the Southern District of Mississippi.

BRIEF OF WILLIAM L. NUGENT, FOR DEFENDANT IN ERROR.

Clarion-Ledger Print, Jackson, Miss.

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A.

There is no force in the first error assigned by the plaintiff in error. There are three complete answers to the suggestions of counsel:

1. The action is *case;* and the *gravamen* of the complaint is, that the bankers, Britton & Koontz, who undertook the duty of collecting the notes for the defendant in error, and, if they were not paid, of taking all the necessary steps to bind the endorsers, neglected to discharge the duty, failed to present the notes at their maturity, for payment, and thus released the endorsers, one of whom was per-

fectly solvent, and who was, in consequence of such failure, relieved by the judgment of the Circuit Court of the United States in Kansas. The possession and and ownership of the notes by the plaintiff and their delivery by him, or his agent, to the defendant bankers for collection, etc., are matters of *inducement* as adverse counsel admits. The plea of *not guilty* operates only as a denial of the *breach of duty or wrongful act* alleged to have been committed by the defendant, and not of the facts stated in the *inducement*, and no other defence than such denial is admissible under that plea. All other pleas in denial should take issue on some particular matter of fact alleged in the declaration; and all matters of confession and avoidance should be pleaded specially as in actions of *assumpsit*. *Not guilty* does not put in issue the *inducement* as to plaintiff's right, though in some degree part of the description of the injury; the doing of the wrongful act by the defendant is thus put in issue alone, and the right in which the plaintiff sues is admitted.

1 Chitty's Pleadings, 519; title case;

Trankum vs. Talmouth, 25 E. C. L., 6 Carr. & P., 529;

6 Robinson's Practice, 852–859; 61 E. C. L., 656;

Webb vs. Page, 6 Man. & Gr., 201; 46 Eng. C. L.;

Haine vs. Davey, 6 Nev. & Man., 356; 4 Adolp. & El., 892;

31 Eng. C. L.; *Ross vs. Clifton*, 11 Adol. & E., 631, 39 E. C. L.

Langford vs. Woods, 7 Man. & Gr., 629, 49 Eng. C. L.

2. The statute of the State of Mississippi rendered proof of signatures unnecessary. The language of the Act is very broad: "In suits founded on any

written instrument set forth in the pleading, it shall not be necessary to prove the signature or execution thereof, unless the same be denied by a special plea, verified by the oath of the party pleading the same; *and in no case shall it be necessary to prove any written signature, the execution of any instrument, or any identity or names of persons or description of character, or the persons composing any firm or partnership, which may be set forth in the pleadings, unless the same be denied by special plea, verified by oath as aforesaid;* and the like rule shall prevail as far as may be applicable, in all cases where any writing is pleaded or set up by the defendant, or any signature or names of persons, description of character or partnership set forth in the pleading."

Rev. Code Mississippi, 1871, § 683.

The scope of this statute is very much narrowed by the learned attorney for the plaintiff in error, and the words *italicised* are complacently ignored. The first paragraph of the Act does plainly refer to suits founded on any instrument of writing; it says so in so many words. But how are we to consider the separate and independent clause *italicised*. The lawmaker has said, that "*in no case* shall it be necessary to prove any written signature," and "*in no case*" shall it be necessary to prove the execution of any instrument, which may be set forth in the pleadings, unless the written signature or the execution of the instrument be denied by special plea, verified by the oath of the defendant. Now it makes no difference that the written instrument is set forth in the pleading, "as an incident, or by way of inducement, to the right of action set forth in the declaration,"—we quote the counsellor's

words; the fact is, the written instruments were so set forth and they were necessarily set forth as an *inducement* to the gist of our suit—the negligence or wrongful act of the defendant in connection with them. Here, then, is a case in which the written instruments were properly set forth in the pleadings, and proof of signatures was not necessary.

The counsellor asks, "how could the defendant deny by a special plea, verified by his oath, the signature or execution of an instrument of writing not alleged to have been executed by him, but made by a stranger?" It is not supposed he could have done so in this case without incurring the hazard of a prosecution for perjury, but if the question be directed to the mere physical or mental capacity of the defendant to swear to a a plea of *non est factum* prepared by his attorney, the answer is obvious.

3. The error complained of was thoroughly cured in the after proceedings had in the case. 5 Peters, 132; 5 How., 278; 13 How., 307. The plaintiff below was not to be restricted as to the order in which his evidence was introduced. It was clearly shown that the very notes set forth in the declaration were sent to the defendant by plaintiff for collection, and, if not paid on presentment, for protest and notices to be sent, and that they were received by the defendant on this contract. It was proven by Lambert that he executed and endorsed these notes, and there was evidence "given to prove or tending to prove the other endorsements on the notes;" it was shown that a suit was brought against Emert, endorser, a judgment by default suffered, and an execution issued which was returned "*nulla bona.*" It was, also, established that, in a suit

by the plaintiff against Reynolds, the first endorser, a judgment was rendered in his favor, on the ground that due presentment of the notes had not been made to the maker, Lambert. The error, if any, thus became wholly immaterial; the execution of the notes was fully proven, and their subsequent endorsement, by the clearest implication from the proceedings had against the endorsers. Besides, the presiding Judge was satisfied on this point; and as evidence proving the execution of the notes was before the jury, as well as to prove the endorsement on the notes, the whole question resolves itself into one as to whether the *quantum* of testimony sufficed to prove the facts of execution and endorsement; and the first assignment ceases to present a point for discussion. Under these circumstances, a court of last resort ordained to dispense justice would scarcely pause to consider a pure technicality; shadowy and specious.

B.

The second and third assignments of error present a question of commercial law of some importance, and one which ought to be definitely settled by this court. It is the law here that though there be plain error in a charge, yet if the record present to this court the whole case, and it be plain from such whole case that if the court had charged rightly the result of the trial would have been the same as it was, this court will not reverse.

Decatur Bank vs. St. Louis Bank, 21 Wall., 294;
Brobst vs. Brock, 10 Wall, 519.

The question then is, was the *judgment* of the lower court right? In order to present the several instruc-

tions fairly for the consideration of the court, we make a succinct statement of the case. Plaintiff below, being the holder and owner of the two notes, copies of which are set out in the declaration, transmitted the one, and caused the other to be transmitted, to Britton & Koontz, bankers at Natchez, who were engaged in the business of collecting such paper, for collection, and if not paid when presented for payment at their maturity, to be properly protested, and to have notices of protest forwarded to the endorsers, so as to charge them. These notes were received by the said bankers in due time to attend to these directions. *They never did present the notes to Lambert, maker, for payment.* He lived some twelve or fifteen, or eighteen or twenty miles, from Natchez, in the same county with the bankers; and, *after banking hours on the last day of grace*, the defendant below handed the notes to Hussey, notary public, for presentment and protest. This officer, well knowing that Lambert lived twelve or fifteen, or eighteen or twenty, miles from Natchez, and that he had no place of business in Natchez, presented the notes at three public places in the city, as he says, demanded payment, and thereupon protested the paper. *Notices of this spurious protest were sent to the endorsers*, but Judge Dillon decided, on all the facts, that the notes *had never been presented for payment*, and hence discharged Reynolds, the only solvent endorser. The notary, who was also the Circuit Clerk of Adams county, knew that Lambert had no place of business in Natchez, and that he resided twelve or fifteen or eighteen or twenty miles in the country. The bankers never inquired of the *Sheriff or Tax Assessor* to learn the residence of Lambert, and

their own notary knew exactly where Lambert did reside. One of the series of notes held by plaintiff below was collected by the bankers from Lambert, who had other dealings with them. Lambert had relations living in Natchez, traded in Natchez, bought goods and sold cotton there, and Britton & Koontz knew him from his childhood, but did not know his place of residence at the time the notes matured.

On these facts the defendant asked the court to charge the jury, in effect, that if Britton & Koontz did not know of the place of residence or doing business of Lambert, and, after diligent inquiry therefor in Natchez, were unable to learn the same, and thereupon, at their maturity, handed the notes to Hussey for presentation for payment, protest and the sending of notices, then they are not liable for negligence in the performance of their duties and the verdict should be for them; and that if it was the established custom of Britton & Koontz, in cases where notes were placed in their hands for collection, and demand and protest, upon non-payment, to place such notes in the hands of a notary public for the performance of these duties, this custom would be binding upon the plaintiff and he cannot object to the conduct of the bankers in placing the notes in question in the notary's hands at their maturity for the performance of said acts by him. Mss. R., 38--39.

These instructions were refused and exceptions were taken to the ruling of the court. Other instructions were at the time given by the court, which, we think, covered the real point in controversy and hence no complaint could be made here. The brief of counsel for plaintiff in error does not claim that the court erred

in refusing the second instruction as to the *established custom* of Britton & Koontz, and we pass it by without notice, as *the refusal of it is not assigned for error*. It is not, however, intelligible; no objection was made, that, *after the non-payment of the notes*, they were placed in the hands of the notary for protest and notice. The *gravamen* of the whole case was that the notes never were presented for payment by any one, and on this point plaintiff below lost his suit against Reynolds.

The parcelling of a series of connected instructions, which really constitute one entire charge, for the mere purpose of argumentation, is decidedly objectionable. We, therefore, take the entire charge of the court in order to find out what was in fact said; and thus taken, we do not think the defendant has any ground of objection. The jury were instructed: "if they believe from the evidence that Britton & Koontz received the notes mentioned, for collection, it became their duty to present them for payment to Lambert, the maker, on the last days of grace, April 27, 1874, and April 27, 1875, and, upon non-payment, to give notice thereof to the endorsers," unless they were otherwise released, or did some other act, which would excuse them for failure to discharge their duty. This qualification is immediately explained thus:

"It is admitted that Britton & Koontz did not make presentment and demand of payment of either of said notes. The defendant, to excuse himself (them) has offered proof that said notes were, upon the days they respectively fell due, placed in the hands of Hussey, a notary public, with instructions to present the same and demand payment, and, in default thereof, to

protest the same, and give notice to the endorsers. If you shall find from the evidence that said Britton & Koontz used due diligence in ascertaining the residence of Lambert, the maker, and placed the notes in the hands of Hussey, a duly qualified notary public, within a reasonable time for said Hussey to present the notes to Lambert and demand payment upon the day the same fell due, as above stated, and at his residence or place of business, and gave to said notary all the information they had, or might have obtained by reasonable diligence, of the place of his residence or business, such acts on their part would exonerate them from the duty of making presentment and demanding payment by themselves or agents. * * * * * *" And still further to place all the defenses available fairly to the jury, they were instructed as follows:

"If the proof shows that Britton & Koontz used reasonable diligence to ascertain the residence or place of business of Lambert, and failed to ascertain the same, they were excused from making the demand of payment themselves, or from communicating such information to Hussey. The question of diligence is a question of fact to be determined by you from the evidence. Reasonable or due diligence is such as a prudent man will exercise in his own affairs—such as enquiring of those who would most likely know the place of residence of Lambert, the burthen of proving which is on the defendant." Mss. Rec., 39 to 43.

Comparing these with the first instruction asked by defendant we think there is no essential difference. The Court was asked to charge the jury, that, if "Britton & Koontz did not know the place of residence or of doing business, of said Lambert, and, upon making

diligent inquiry therefor, in the city of Natchez, were unable to learn the same, and therefore placed the notes in the hands of Hussey for demand, protest and notice, they are not liable for negligence, etc. Mss. Rec. 38--39. The court did instruct the jury that, "if * * * Britton & Koontz used due diligence in ascertaining the residence of Lambert, the maker, and placed the notes in the hands of Hussey, * * * within a reasonable time for said Hussey to present the notes to Lambert and demand payment upon the day the same fell due * * * at his residence or place of business, and gave the notary all the information they had, or might have obtained by reasonable diligence, of the place of his residence or business, such acts would exonerate them from the duty of making presentment and demanding payment by themselves or agent. * * *" Mss. Rec., 40--41. And "if the proof shows that Britton & Koontz used reasonable diligence to ascertain the residence, or place of business of Lambert, and failed to ascertain the same, they were excused from making the demand of payment themselves, or (and) from communicating such information to Hussey. * * *" Mss. Rec., 42.

The Court was asked to rest the exoneration of the bankers upon the want of knowledge on their part of the residence of Lambert, or of his place of business, and their inability, after diligent inquiry, to ascertain either, followed up by handing the notes to Hussey for demand, protest and notice. The Court actually *did charge* the jury, charge four, that if they used due diligence to ascertain the residence or place of business of Lambert, and failed to ascertain the same, they were excused from making the demand of payment,

and could exonerate themselves from liability by delivery of the notes to Hussey, notary public, *within a reasonable time*, for him to present the notes to Lambert, demand payment, and protest for non-payment, etc. The only difference between the charge asked and those given is that the court used the words, "within a reasonable time," in connection with the delivery of the notes to the notary public for presentment, etc. It is true that, in the third charge, the court refers to the duty, on the part of Britton & Koontz, to give information to Hussey, but that is fully counter-balanced by the fourth charge. Britton swore he did not know where Lambert resided; and Lambert had no place of business in Natchez. The notary knew he had no place of business in Natchez, and that he resided on his plantation eighteen or twenty miles out of Natchez, in Adams county. Britton said the notary was instructed to take the course pursued; the notary says he was not. Be that as it may, the whole case under the instructions of the Court, was made to turn upon the isolated fact as to whether Britton & Koontz used due diligence in the attempt to ascertain the residence of Lambert, and failed. Certainly, even if they had and failed, they were bound to afford the notary ample opportunity for presenting the notes, and not, by keeping the notes, until after banking hours, cut off the time necessary for a ride of eighteen or twenty miles. *There was not sufficient time given for demand and protest in any point of view.* We thus conclude that the instruction first asked by defendant was substantially given by the court.

We do not concede the assertions of counsel as to

what the record "clearly shows." It was a question left with the jury, whether Britton & Koontz had used due diligence to learn the residence of Lambert, and the question was decided adversely to them. They were directed to find out whether Lambert had a "place of business" in Natchez; they knew he had not. It was then their duty to ascertain his place of residence. Their notary knew he had no place of business in Natchez, and the *exact place* of his residence. They did not inquire of him, nor of the Sheriff or Tax Assessor of Adams county. These three officers, Hussey being Circuit Clerk, were the persons of all others to give the desired information. Plaintiff swears he told Britton & Koontz that Lambert lived on his plantation; and while Britton denied this statement, his testimony, on the subject of the inquiries made, is, to say the least of it, very unsatisfactory. Here it is: "Mr. Koontz spoke to witness and asked him if he knew where Lambert resided, remarking that the demand must be made at his domicile if he had any; to which witness replied that he knew nothing about him; Koontz then made the inquiry of several persons who came into the bank, and none of them could give any information about Lambert; Koontz then left the bank for the purpose of trying to learn where Lambert lived and *told witness he could learn nothing about him, and that the notary would have to comply with the law in such cases, and present at several of the most public places; witness is certain Koontz made diligent efforts to ascertain Lambert's place of residence and they were unsuccessful.*" Of course what Koontz *told Britton* was not evidence, nor was the assertion of certainty in Britton's mind anything but the bare suggestion

of an opinion, based upon the facts detailed by him in connection with the acts of Koontz. The jury believed the statement of the plaintiff, and that the failure on the part of Britton and Koontz to make inquiry of their own notary, and of the Sheriff and Tax Assessor of the county of Adams, did not consist with the idea of having exercised due diligence to find out where Lambert resided. The plaintiff had told Britton & Koontz that Lambert lived on his plantation some miles distant from Natchez; but not knowing whether he had a place of business in the city directed inquiry in that direction for obvious reasons. The idea was to be certain in making the demand, and on default, protest and give the requisite notices.

The learned counsellor is equally at fault in stating the question presented to the jury, *under the instruction of the Court;* it is true we contended and now contend for the position that the notary was not our *agent* but the agent of Britton & Koontz. The Court did not, as we have seen, adopt that view; improperly we think, but the fact remains, that the sole question in the case for the determination of the jury was, whether Britton & Koontz had used due diligence in ascertaining the *residence* of Lambert, who had no place of business in Natchez. The jury was charged to find for defendant if they believed such diligence had been used. That granted, they were told that Britton & Koontz fulfilled their duty when they handed the notes to Hussey, for demand, protest and notice. The force of our criticism is admitted by counsel on page 21 of his brief, for his whole argument proceeds upon the assumption that Britton & Koontz had failed to present the notes for payment, because of their ina-

bility, after the use of due diligence, to ascertain Lambert's place of residence. If this *assumption* were true we would have been successful in our suit against Reynolds in Kansas; and unsuccessful here. It was precisely because such diligence had not been used that the jury found in our favor.

But counsel criticises the first part of the charge given by the Court, brief page 22, as detached from the balance of it, and places the principle ground of objection, "upon the *fundamental error* that it was the duty of the bankers, after receiving the notes for collection, to present them at maturity to the maker for payment, and, upon non-payment, to give notice thereof to the endorsers." If the bank did not undertake this duty, what duty was in fact undertaken? It was employed to collect the notes, but they could not be collected without presentation for payment and demand, therefore it did undertake to present them to the maker for payment. But counsel says the charge excluded the idea that this duty could be performed by any other person only the notary; and yet the next branch of the charge, and that numbered four, present the very idea which it is said the first instruction excluded. See pages 13, 14, brief for plaintiff in error.

It would appear that counsel should have hesitated to rely upon this view when his own authority so explicitly contradicts him. It is, indeed, laid down by Chitty, that "the holder of bills or notes, himself or *his agent*, presents the same for payment, on the day they fall due * * * * and if not paid, he sends them, the bill or note, to a notary, etc. And if presented either by the holder, or some other person, if he be ill or absent, he should cause it to be protested.

For this purpose he should carry the bill to a notary, *who is to present it again* to the drawer and demand payment, and protest it." Now had it been necessary to protest the notes in this case the rule laid down would undoubtedly apply: the notes should have been presented by Britton & Koontz, at maturity, and payment thereof demanded; if refused, they should have been seasonably given to a notary whose duty it would have been to present them *again* for payment before protest. *Non constat* they would have been paid. Chitty on Bills, 458, margin, by Hulme, 13 Amer. Ed.

It is true the plaintiff wanted the notes to be protested if not paid on demand at maturity, but he wanted, first of all, that a proper demand for payment should be made as a condition precedent to the protest. How could the notes be paid, if payment was not demanded?

Counsel separates into distinct charges the one general instruction given by the Court, criticises them severely "as diffuse," and yet presents them together in one bill of exceptions into which the whole evidence is incorporated. That is not exactly fair to the Court, though in no other way, could occasion be furnished for the statement on page 24 of his brief that, "no direction is given to the jury as to what would be sufficient in law to release them, (Britton & Koontz) from this obligation, but that matter is submitted wholly to their own notions, and it is impossible to know how they solved it." If counsel had attentively read and considered the charges, numbered two and four, he would have discovered his mistake: *the proper direction was given to the jury.*

This is apparent, and the effort is made to question the propriety of the second instruction. It is said that Britton & Koontz were required "to show not only due diligence, on their part, to ascertain the residence of Lambert, but that they gave to the notary all the information which they had, or might have obtained by reasonable diligence as to his place of residence or business. This is objected to because "it is clear," says the counsellor, "that the bankers *did not know* the place of residence or of business of Lambert, that they had made diligent inquiry to ascertain his place of residence, and that the notary made inquiry at three of the most public places in Natchez." "This," he says, "shows sufficient inquiry and the court should so have instructed the jury." Brief, page 25. Now the facts were that the notary and the bankers knew Lambert did not live or have a place of business in Natchez; Hussey knew exactly where he did live; and Britton & Koontz knew where he lived if the testimony of Niccolls is to be credited. It would have been highly improper for the Court, *in view of the conflicting evidence*, to assume to itself the right to say, the bankers had displayed due diligence in the effort to find Lambert's place of residence. Now what *is* due diligence in the presentment of a promissory note, must depend on the circumstances of each particular case. Bank vs. Carneal, 2 Peters, 551; *Plahto vs. Patchin*, 26 Mo., 389. These *circumstances* were to be determined by the jury, and it was the duty of the Court to give only a general instruction as to what was meant by "reasonable or due diligence." This was done in the fourth instruction: "Reasonable or due diligence is such as a prudent man will exercise in his own affairs—such as

inquiring of those who would most likely know the place of residence of Lambert, the burthen of proving which is on the defendant," because it was admitted that the notes had never, in fact, been presented for payment. The usual direction on this subject is: "Reasonable or due diligence is such as men of business usually exercise when their interests depend on obtaining correct information." That given in this case is not so strong, and the illustration of the rule is very apposite.

Palmer vs. Whitney, 21 Ind., 58;

Union Bank vs. King, 2 La. An., 928;

Manchester Bank vs. Fellows, 28 N. H., 302;

Fisher vs. Evans, 5 Binn., (Pa.,) 542;

It is only where the facts are *undisputed* that due diligence may be said to be a question of law; where it depends upon the testimony of witnesses given before the jury, it is proper to submit the whole question to them under appropriate instructions on the law, which was done in this case.

Gadley vs. Goodloe, 6 Sm. & Mar., 257;

Suiville vs. Welch, 29 Mo., 203;

Walker vs. Stetson, 14 Ohio, 89;

Brenzer vs. Wightman, 7 Watts & S., 264;

Bank vs. Lawrence, 1 Peters, 583;

Bank vs. Swann, 9 Peters, 33;

Atwood vs. Ragland, Minor, (Ala.,) 85;

Robertson vs. Vogle, 1 Dall., 252;

Camdon vs. Doremus, 3 How., 515;

Bank vs. Pettit, 4 Dall., 127;

Belden vs. Lamb, 17 Conn., 441;

Earley vs. Gettysburg, 7 Serg. & R., 324;

Eccles vs. Ballard, 2 McCord, (S. C.,) 388;
Bronaugh vs. Scott, 5 Call, (Va.,) 78.

Counsel considers the fourth charge separately and thus creates a difficulty for the gratification of toppling it over. The instruction was a fair one; the jury was informed what was, in law, meant by reasonable or due diligence in the plainest language, and the Court did not wrest the term from the facts. The jury was directed to determine whether "due diligence" had been exercised, from the evidence. *There was no proof whatever that inquiries had been made at three of the most public places in Natchez* as to the residence of Lambert. The notary *knew where he lived*, and went to the post office, city hall and court house and "*inquired for Lambert, but could not find him to demand payment.*" *Mss. Rec.*, 25, 26, 27. He did not ask for *Lambert's residence*, because he knew where that was; he asked for Lambert so as to demand payment from him. The extent of the inquiry made by Koontz was of "several persons who came into the bank." It is true Britton says he left the bank to learn where Lambert lived and told witness he could learn nothing; but we are absolutely in the dark as to what he *did* when he left the bank. If he had asked his own notary, the Circuit Clerk, or the Sheriff, Tax Assessor, or relatives of Lambert in the city, he could readily have learned where Lambert lived.

On Britton's statement, and that of the notary, we have a firm conviction that no effort was made to find out where Lambert lived. Britton says: "Witness asked no information of Lambert's residence—the notes being dated at Natchez, the presumption was the party lived there—in such cases it is not customary

to make inquiries as to the residence of the maker—neither witness nor any one in his employ, presented the notes to Lambert for payment—they were handed to the notary for that purpose on the days they respectively fell due;" and, we add, *after banking hours*, when it was impossible for Hussey to present them to Lambert at his residence. Now Koontz told Britton the notary would have to present the notes at "several of the most public places" in Natchez; and Britton says the customary instructions were given to Hussey when the notes were handed to him.

Hussey says he acted on his own judgment and "considered that said notes, being dated at Natchez, and no place of payment being stated therein, the place of payment was in law at Natchez, and not at the maker's domicile outside of Natchez, and that it was not his duty to go to his domicile." That we think was precisely the opinion of the bankers, and hence no inquiry was really made in earnest. This is still further manifest from the fact that the notes were kept in bank until after banking hours in the afternoon, and the further fact that any reasonable inquiry would have resulted in the ascertainment of Lambert's residence.

But it is insisted that the Court erred in stating that it was the duty of the bankers to make efforts to learn the place of residence, or of business of the maker, and "that they were not justifiable, being ignorant of such place, to place the paper in the hands of a notary public to learn the place of payment, and to make presentment for payment and give notice to the endorsers of non-payment, though that course was clearly contemplated by the plaintiff's letter in evidence." Brief, 27. *Now the instruction does not state any such*

thing. It simply says that "if the proof shows that Britton & Koontz used reasonable diligence to ascertain the residence or place of business of Lambert, and *failed to ascertain the same*, they were excused from making the demand of payment themselves," and, recurring to the third charge, if they, thereupon, "placed the notes in the hands of Hussey, * * * within a reasonable time for said Hussey to present them to Lambert and demand payment," they had wholly discharged their duty. The Court is not, therefore, justly condemned, and the charges, taken together, do not warrant the assertion of counsel.

It is equally unjust, in our opinion, to say that it was the duty of the Court, unasked, to say to the jury that if they believed the notary knew the place of residence of Lambert, when the notes fell due and failed to present them there for payment, without the fault of the bankers, and from an erroneous idea of his duty in the matter, the bankers were not responsible for his failure, brief, 26, when back of all this there was a failure on the part of the *bankers* to present the notes for payment to Lambert. That idea of the law was not in the mind of counsel *when he asked his instructions.* We take it that he now insists that it was no part of the banker's duty to present the notes for payment, and that they were absolved from liability by the mere act of handing the notes, after banking hours on the last days of grace, to a notary for presentment, demand, protest and notice. That is the view now obtruded upon the Court of last resort; and while it involves the solecism, that a collecting agent is one who receives paper for collection upon the implied contract that he is to hold the paper in his hands until after

banking hours on the last day of grace, and then turn it over to a notary public to collect, or if not collected, to protest, etc., we are induced to consider the question somewhat at length.

There were, however, no pleas in confession and avoidance. The declaration alleges that defendants neglected to present the notes to Lambert at their maturity and demanded payment thereof, and that, by reason of this negligence, plaintiff had lost his debt and his right to proceed against Reynolds, first endorser; the plea is that defendants were *not guilty* of this negligence; and the proof shows they were. All the efforts, therefore, to avoid the consequences of the neglect, denied but proven, by proof that the notes were handed to a notary for the purposes of making a demand and of protesting the paper must amount to nothing. There were no pleas under which such matters of fact could be introduced for consideration by the jury. They were in *confession and avoidance* and the plea denied simply the acts of negligence charged.

C.

The evidence in the case showing that the plaintiff failed to recover, on the notes, against Reynolds, the endorser, because the bankers, Britton & Koontz, neglected to demand payment of the maker, and, upon the dishonor, to give notice to the endorser, the question next in order is: Are they chargeable? In other words, whether, by the negligence, they made the paper their own and are bound to pay the same to plaintiff? Involved in this, there is another question as to whether they discharged themselves by handing the paper to a notary for presentment, protest, etc.

The two questions run into one another and must necessarily be disposed of together. We may as well remark, before looking into the cases, that one may act in good faith and still be liable for, and guilty of, gross negligence; that actionable negligence is the disregard of some duty, or rule of conduct prescribed beforehand, or arising so manifestly from the facts as to leave no doubt of its existence; that where one of two innocent persons must suffer by the wrongful act of another, the loss will fall upon him whose negligence has given occasion for such wrongful act; and that even where both parties have been negligent, if the plaintiff's fault be slight as compared with that of the defendant, he can recover.

Lincoln vs. Buckmaster, 32 Vt., 652;
Tally vs. Ayres, 3 Sneed, 677;
Warner vs. R. R. Co., 6 Phila., 537;
Hertell vs. Bogert, 9 Paige, 52;
Chicago R. R. Co., vs. Triplett, 38 Ills., 482;
Stucke vs. Milwaukee R. R. Co., 9 Wis., 202;
Milwaukee R. R. Co., vs. Hunter, 11 Wis., 160;
Peoria Bridge Ass. vs. Loomis, 20 Ills., 235;
Whirley vs. Whiteman, 1 Head, 610.

The decisions of the State Courts as to contracts, or questions of general commercial law, are not binding on the Courts of the United States, Swift vs. Tyson, 16 Peters, 1; Carpenter vs. Ins. Co., Ibid 495; Oates vs. National Bank, 100 U. S., 239; and it is our first duty to ascertain what the Courts of the United States have decided upon the question at issue. The facts, out of which the questions arise, are briefly these:

Plaintiff, being the owner for value before maturity, of the notes in controversy, sent them to Britton &

Koontz for collection, to present them for payment, and, in case of dishonor, to have them protested, and to notify the endorsers, one of whom, at least, was good. Britton & Koontz *never made legal demand of payment;* but, on the last days of grace, after banking hours, handed the notes to a notary, *without any special instructions, and the notary never demanded payment.* On the contrary, he went to two or three places in Natchez, and, failing to find the maker of the notes, went through the farce of protesting. The *notices* of this spurious protest were sent; and the alleged protests, show, on their face, that *no* demand for payment was made.

The law announced by the Supreme Court of the United States, after an elaborate review of the authorities, is thus stated: "When a bank, as a collecting agency, receives a note for collection, its position is that of an *independent contractor*, and the instruments employed by it in the business contemplated, are its agents, and not the sub-agents of the owner of the note; and when an attorney at law is employed he is the agent of the collecting agent, and not of the creditor who employed that agent." We refer to the case, and those cited approvingly by the court:

Hoover vs. Wise, 91 U. S., 313, 315;

Cited: Reeves vs. State Bank Ohio, 8 Ohio St., 465;

Mackay vs. Ramsay, 9 Clark & Fin., 818;

Montgomery Co. Bank vs. Albany Bank, 3 Seld., 203;

Allen vs. Merchant's Bank, 22 Wend, 215;

Bradstreet vs. Everson, 72 Penn. St., 184;

Lewis & Wallace vs. Peck & Clark, 10 Ala., 142;

Cobb vs. Beacke, 6 Adolp. & Ellis, 930;

Alley vs. Rogers, 19 Gratt., 366.

In Hoover vs. Wise, *supra*, the Supreme Court of the United States do not undertake to reason out the conclusion from any general rules of law applicable to the relation of master and servant, or principal and agent; but review the authorities referred to, and give their sanction, as we understand the case, to the result stated above. We will call special attention to the cases, which, the Court think, establish the doctrine beyond controversy, hereafter. We now refer to the only two cases in the other United States Courts which we have been able to discover.

In Woolen vs. New York Bank, 12 Blatch, 361, the Court say: "By receiving a draft for collection, the bank receiving becomes the agent of the owner, and, in the discharge of its obligations as such, is bound to present the same for acceptance, *without* unreasonable delay, and to present the same at maturity; and, if not accepted, or paid when presented, it must take such steps, by protest and notice, as are necessary to charge the drawer and endorser. While, ordinarily, it is not necessary to present a draft for acceptance—presentment and demand of payment at maturity, with due notice and protest, if not paid, being sufficient to hold the drawer and endorser—this rule does not obtain as to a collecting agent, but prompt presentment for acceptance is required, so that, in case of non-acceptance, the owner can resort immediately, and before maturity, to the drawer. Upon failure to discharge this duty, the receiving bank becomes liable, as for negligence, for any damages resulting from the default." 1875.

In Kent vs. Dawson Bank, 13 Blatch, 239, *et seq.*, the whole doctrine is discussed, and the conflicting adjudi-

cations reviewed. The statement is so clear that we quote the words of the learned Judge: "In the decisions of questions of commercial law, the Federal courts do not feel bound to adhere to the course of adjudication in the courts of the State in which the action is tried. It is to be regretted that a uniform rule should not have been adopted by the courts upon a question of such importance, and one that so frequently arises; but it will be seen that it is involved in a hopeless conflict of authorities. In New York and Ohio, and in England, the adjudications are, that the receiving bank is the agent of the owner to make collection, and liable for the default of the sub-agent to which it transmits the paper, * * * while in Connecticut, Massachusetts, Pennsylvania and Illinois, the contrary doctrine is asserted. * * * * No decision upon the question, of which I am aware, has been made by the courts of the United States, though the case of The Bank of Washington vs. Triplett (1 Pet., 25,) is referred to in several of the decisions as one in point; but that case differs essentially from this, because, there, it was conceded that the draft was sent to the receiving bank to be by it transmitted to a sub-agent for collection, and the action was brought by the owner of the draft against the *sub-agent*. In many of the cases referred to, the liability of the receiving bank was predicated upon the theory that the sub-agent was its agent, and not the agent of the owner of the paper, while, in others, liability was denied, upon the theory that the sub-agent was the agent of the owner." The learned District Judge then refers to the conflict of the authorities as to whether the owner can proceed against the receiving bank, or its sub-agent, or either at election,

and says, that, in the confusion of the cases, he must adopt a conclusion, which seems best to accord with principle, and, therefore, gave judgment against the receiving bank.

The cases which exonerate the receiving bank are criticized; and the reason assigned for such exoneration, that the result rests, as it is said, upon the supposed intention of the parties; and that the receiving bank was not intended, by its own officers or employes, to collect the paper, but to transmit to another agent to perform that duty, is answered thus: "The first objection to this position is, that it is inconclusive, because it fails to determine the vital question, whether it is to be presumed the parties intended that the ultimate agent shall be the agent of the receiving bank, or the agent of the owner of the paper; and the doubt thus presented has found expression not only in the cases cited, but in others, where the question was, whether the bank is liable for the default of a notary to whom it delivers paper to protest. (Ayrault vs. Pacific Bank, 47 N. Y., 570; Citizens' Bank vs. Howell, 8 Mo., 530; Bowling vs. Arthur, 34 Miss., 41; Agricultural Bank vs. Commercial Bank, 7 S. & M., 592.) The second objection is, that this presumption cannot be indulged without violence to the terms by which the parties have defined the character of the act to be performed. The owner sends the paper, with instructions to collect it, and the receiving bank assumes to act upon these instructions. The undertaking would seem to be one to collect, in the sense in which that term is used when applied to a bank, or financial agent, rather than undertaking to select a suitable agent for the owner. * * * If it is intended that the receiving

bank shall select an agent for the owner, it would seem that the instructions would naturally direct the bank to forward the paper for collection. * * * If the facts imply an undertaking on the part of the receiving bank to collect the paper, rather than one to transmit it to another to collect it, as agent for the owner, I can see no reason why the receiving bank should not be liable to the same extent as it would be if one of its immediate employes received and appropriated the money. * * * * I know of no exception to the rule that when one, as principal, contracts to fulfil a duty towards another, he is liable for any default, whether on his own part, or that of those to whom he delegates the duty. The cases where a bailee is not liable for the miscarriage of his agents or servants are not exceptions to the general rule, for there, the implied contract is only to exercise ordinary care, and if, in selecting the agents, this duty has been fulfilled, the implied contract is satisfied."

This decision was rendered in 1876, and is important, as showing the advanced positions taken by the courts of the United States on this very interesting branch of commercial law.

The decision in Bank of Washington vs. Triplett & Neal, 1 Pet., 29, does not conflict with the views stated in the foregoing cases. The court expressly say: "The *bill was not delivered to the Mechanics' Bank of Alexandria for collection, but for transmission to some bank in Washington to be collected.* That bank would, of course, become the agent of the holder. By transmitting the bill *as directed*, the Mechanics' Bank performed its duty, and the whole responsibility for collection devolved on the bank which *received the bill for*

that purpose. The Mechanics' Bank was the mere channel through which Triplett & Neal transmitted the bill to the bank in Washington. * * * * The duty of that bank was precisely the same, whoever might be the owner of the bill; and if it was unwilling to undertake the collection without precise information on the subject, that duty ought to have been declined. * * * Unquestionably, by *failing to demand payment in time (or at all)*, the bank would have made the bill its own, and would become liable to T. & N. for its amount. The inquiry is, therefore, into that fact."

The decisions all, therefore, fix the liability upon the bank *undertaking the duty of collection* for any neglect, by which the owner of the note or bill is damnified, in the absence of an express contract to the contrary.

The most recent adjudications in the several State courts conform to the doctrine thus announced; and it is universally held, we believe, that a bank receiving paper for collection, undertakes to use due diligence in making demand at maturity, and giving the proper notice of non-payment. Proof that the paper would not have been paid if presented, is no defense, and an unreasonable delay, even, would charge the bank with a liability for the amount.

Bank of New Hanover vs. Kenan, 76 N. C., 340;
Steele vs. Russell, 5 Neb., 211;
Capital Bank vs. Lane, 52 Miss., 677;
Fabens vs. Mercantile Bank, 23 Pick., 330;
Thompson vs. Bank of the State, Riley (S. C.), 81;
Branch vs. Knox, 1 Ala., 148;
Bank of Mobile vs. Huggins, 3 Ala., 206.

Being thus bound to present the paper, at the proper

time and place, for payment, and, in case of neglect, liable for the loss sustained thereby, it is the agent of the owner of the paper, and not, in any sense, the agent of the maker who pays it. It is hence bound to use reasonable skill and diligence to make a seasonable demand on the promisor, and give notice to the indorsers in case of dishonor. If it employs a notary to present the note for payment and to give the proper notice to charge the parties, the notary is the agent of of the *bank*, and not of the depositor or owner of the paper, and the bank is liable for any neglect of duty by him, by which any of the parties are discharged. And although this liability may be varied by express contract, or by implication arising from general usage, the facts, that it is usual for banks to resort to a notary for such services, and that the owner, on depositing the note, said that he wanted it protested if not paid, are not evidence that the undertaking of the bank was simply to hand the note to a notary.

Ayrault vs. Pacific Bank, 47 N. Y., 570;
Smith vs. Essex Co. Bank, 22 Barb., 627;
Runyan vs. Latham, 5 Ired., 551;
Crow vs. Mechanics' Bank, 12 La. An., 692;
Fabens vs. Mercantile Bank, 23 Pick., 330;
West Branch Bank vs. Tulmer, 3 Pa. St., 399;
Allen vs. Merchants' Bank, 22 Wend., 215;
Com'l. Bank vs. Union Bank, 19 Barb., 391;
Reeves vs. State Bank, 8 Ohio St., 465;
Martelett vs. U. S. Bank, 1 Martin, N. S., 365;
Montgomery Co. Bank vs. Albany Bank, 7 N. Y., 460;
VanWert vs. Wooley, 3 Barn. & Cress., 145.

We now refer to the case of Allen vs. Merchants'

Bank, 23 Wend., 227, approved in Hoover vs. Wise, 91 U. S., because of its thorough vindication of the rule for which we are contending.

In that case, the resolution adopted by the Court was as follows: "Resolved, That when a bank or broker, or other money dealer, receives, upon a good consideration, a note or bill for collection, in the place where such bank, broker, or dealer carries on business, or at a distant place, the party receiving the same for collection is liable for the neglect, omission or other misconduct of the bank or agent to whom the note or bill is sent either in the negotiations, collection or paying over the money, by which the money is lost, or other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary, express or implied." P. 244.

In discussing the question as to whether the negligence having been committed by a notary, a *commissioned public officer*, appointed by the executive authorty of the state, to whom the duty of presenting and protesting the bill was confided, would exonerate the bank, the Court say: "If this *laches* had been committed by that officer in that part of his duty which was *peculiarly official, and could only be performed by himself or some other notary, he having been requested or instructed to perform such duty*, I doubt whether the collecting bank, or any other institution or person, employing him, would be responsible for his neglect in that which was not *voluntarily* confided to him, but wherein his *official duties were rendered necessary by the requirements of the law; and when his employer had done all that was in his power for the performance of the*

original undertaking. Then it would seem that the notary was alone responsible."

But the Court said the principle did not apply in the case at bar, and gives this reasoning as a solution of the principle announced: "Notaries are commissioned public officers whose office gives to the notarial attestation a peculiar authority and effect according to the law of negotiable paper. This attestation it is their duty to grant when directed and required. But they are with us, also in practice, the agents of the several banks in whose *employ* they may be. As such agents, it appears that business, connected with their official character, yet still *not strictly official*, is confided to them, such as sending notices of non-acceptance or non-payment when no protest is required. To them, the evidence shows the banks often send paper, when at maturity, to be presented for acceptance, without specific instructions, confiding to them wholly, as their agents, to do what may be necessary in the case. In the present case, the notary's strictly official acts were sufficiently correct. Upon refusal to accept, he noted the bill for protest. This is all that the law required. "The notarial protest is a requisite step in the case of a foreign bill, and must be made promptly on refusal. It is sufficient, however, to note the protest on the day of demand, and it may be drawn up in form at a future period." 2 Kent's Com., 93. * * * Again; the bill was sent without particular instructions and left to the notary's discretion. * * * All this gives to the notary, in my view, the character of an agent to whose discretion his employer trusted in part, and for whose neglect they should be answerable." P. 241.

On the general question of liability the Court em-

ploy this language: "It is well settled in this State that there is an implied undertaking by a bank, or banker, receiving negotiable paper deposited for collection, to take the necessary steps or measures to charge the drawer, maker or other parties upon the default or refusal to accept or pay. The ground of this rule is, that the acceptance of negotiable paper thus deposited for collection, forms an implied undertaking to make the demand and give the notice required by law, or mercantile usage, for the perfect protection of the holder's rights against all previous parties, for which undertaking the use of the funds thus temporarily obtained, or of the average balances thereof, for the purpose of discount or exchange, forms a valuable consideration. Had we no express authority on this head, I should consider the acceptance by a bank of paper for collection from a customer, in the usual course of his business, as sufficient evidence of a valuable consideration. The whole ordinary business of a bank with its dealers is one of mutual profit or accommodation, and must be taken together, (unless some part is separated by express understanding), and it is not for a bank, or for a Court, to consider that a collection in a particular place must be regarded as a gratuitous favor. If accepted at all, the general profits and advantages of the business of which this may perhaps be an unproductive part form a good consideration for the undertaking.

"The deposit of a domestic bill or note to a bank or banker, for collection is a contract to perform those certain duties necessary for the collection of the paper, and the security of the holder. Neither legal construction, nor the common understanding of men of business,

can regard this contract, (unless there be some express understanding to that effect,) as an appointment of the bank as an attorney or personal representative of the owner of the paper, authorized to select other agents for the purpose of collecting the note, and nothing more. * * It is an implied agreement with the bank itself, of whose officers and agents they have no knowledge, and with which they have no privity of contract.

"When a trust is put in one person, and he whose interest is entrusted is damnified by the neglect of such as that person employs in the discharge of that trust, he shall answer to the person damnified. 12 Modern R., 490. The same doctrine is thus summed up by Judge Story, from a long succession of cases: "It is a general doctrine of law that the principal is held liable to third persons in a civil suit for the frauds, deceits, misrepresentation, frauds, negligencies and other malfeasances, or misfeasances, or omissions of duty of agent in the course of his employment, although the principal did not authorize or justify, or, indeed, know of such misconduct, or even if he forbade them, or disapproved of them." Story on Agency, ch. 17, § 452. The maxim is *respondeni superior*. Story's Agency, § 454. Such, then, being the general law, the bank, in undertaking to collect negotiable paper is answerable for the neglect of its ordinary agents."

This distinction between the liability and duty of a receiving bank, in the case of a *bill* and a note deposited for collection, is drawn in the case of Thompson vs. Bank of the State, 3 Hill (S. C.), 81, and the general doctrine is announced, quite forcibly, and clearly demonstrated. In that case the defence was that a notary

had been employed, and that as he was a public officer, the bank was not responsible for his ignorance or laches, unless his incapacity was notorious. After stating that the question did not arise in the case, the court say: "The question here arises on a promissory note; protest for non-payment is not necessary; it is altogether superfluous; a demand for payment was necessary; and to enable it to be proved it was necessary to employ some one to make it; but a notary was not requisite; any other individual would have sufficed to make the demand, or to make inquiries necessary to giving notice. Supposing the notary employed here for that purpose, which is not clear, he cannot be regarded as acting officially and must be regarded as the mere agent of the bank, for whose omissions or mistakes the bank is liable. * * * * The President made inquiries at Shannon's, and receiving no information concerning the endorsers gave the note to the notary, who protested it, without further inquiry concerning their residence, although Goodman, the maker, resided in the town, and the bank knew that Thompson, the plaintiff, was the owner of the note. If the reason assigned in the protest (82) be the ground assumed by the notary, as the agent of the bank, that, of itself, would furnish sufficient evidence of his ignorance and incapacity to charge the bank. * * *.

"Whoever undertakes an agency, engages likewise to employ an adequate degree of skill, and to use a reasonable degree of diligence. In this case, the bank engaged for the exercises of so much skill, in the particular department of business, as to perform the duty of collecting the note, and, as I have endeavored to show, of doing whatever was necessary to charge those

to whom the plaintiff might resort for payment; and, in accomplishing this, that it would omit nothing which reasonable diligence would enable it to perform. If it be said that it was the fault of the plaintiff that the bank was not informed of the residence of the endorser, it may be replied, that the bank must have known, when it took the note for collection, that a notice of dishonor might become necessary; and if the residence of the endorsor was unknown, as the information was indispensable to enable the bank to perform the duty, it was equally the duty of the bank to seek for and obtain it, at the time of receiving the note. And supposing both to be in fault at the time of the dishonor of the note, it was surely incumbent on the bank to use all the means then in its power, to ascertain the residence of the endorser. It was submitted to the jury to say whether the bank had used reasonable diligence in seeking the information, and the jury have decided against the bank, and, a majority of the court think, with good reason." *Ibid.* This case, we think, harmonizes the apparent conflict in some of the cases hereafter referred to. Chief Justice Shaw announces the law, in Fabens vs. Mercantile Bank, *supra*, thus:

"* * * When a bank receives a note for collection, it is bound to use reasonable diligence and skill in making the collection, and for that purpose is bound to make a *seasonable demand* on the promisor, and, in case of dishonor, to give due notice to the endorsers, so that the security of the holder shall not be lost, or essentially impaired, by the discharge of the endorsers. How far this liability may be modified by agreement, or by general or special notice, is a subject of distinct consideration." "But it is equally well settled," says

he, "that when a note is deposited with a bank for collection, which is payable at another place the whole duty of the bank so receiving the note, in the first instance, is seasonably to transmit the same to a suitable bank, or other agent, at the place of payment." This, upon the theory that the latter bank becomes the agent of the owner of the paper, and not the sub-agent of the bank receiving it for transmission; and Ætna Insurance Co. vs. Alton City Bank, 25 Ill., 243, reaches the same conclusion, though expressed in somewhat different words, thus: "When a bank receives a bill or note for collection against a drawer or maker resident at the place of the bank, or when the bank undertakes for its collection by their own officers, there can be no doubt that it would be liable for any loss that might result from neglect. But when received for transmission, it has fully discharged its duty by sending the instrument in due season, to a competent, reliable agent, with proper instructions for its collection."

The reason for the conflicting decisions may be readily traced. It is a familiar maxim of the law that "*delegata potestas non delegari potest*;" and if this had been kept in view, there would have been no dissent from the proposition that a bank receiving paper for collection, which is payable at its domicile, is bound for any loss which may occur by reason of its own neglect, or that of its employes—even in the case of a bill of exchange which the law merchant *requires to be protested*. The receiving bank can employ its own notary and secure itself against loss by requiring a bond of indemnity, or giving explicit instructions as to the presentment for payment, and accurate information as to the domicile of the drawee or maker. The owner of

the paper has no such opportunity, and gave no authority nor direction to the bank to employ any sub-agent. That was left to the bank, in its own discretion and interest, and it had ample power to protect itself against any neglect on the part of the notary.

The cases in this State, prior to that reported in 52 Mississippi, *supra*, at first blush, seem to antagonize the doctrine for which we contend; but a careful consideration of them will enable us to reach a different conclusion. These decisions are not authoritative in this Court, as we have seen, and even if they related to the construction of statutes, they would not be controlling, unless the very point involved in this case had been necessarily raised and passed upon. We now propose commenting upon them, and the cases in Louisiana and Maryland, which seem to favor the rule that would exonerate the receiving bank from liability, if the paper accepted for collecti n were *seasonably* turned over to a notary for demand, protest and notice.

In Tiernan vs. Com'l Bank of Natchez, 7 How., 656, a *bill of exchange* had been sent to the bank for collection and was placed in the hands of the notary public to demand payment. It was sent by the bank of New Orleans to the Commercial Bank, *and the usage and custom of the banks of New Orleans and Natchez to regard their duty as ended when a bill was thus given to the notary, was recognized by the New Orleans bank.* The Court place the exoneration upon the ground that the notary was a public officer, authorized to give notice as well as to make protest, and that the bank could not have selected a better agent for this purpose. The defendant was, however, a corporation *and the facts were as we state them.*

Agricultural Bank vs. Commercial Bank, 7 S. M. & M., 598, went off upon the authority of the case in 7 How., *supra*, and the Court did not pretend to discuss the real question of liability. The first case was upon a foreign bill of exchange; this on a note, but whether domestic or foreign does not appear. The case is not, therefore, an authority in point; for the Court speaks of Tiernan vs. Commercial Bank as settling the rule that a bank which receives a *note* for collection and places it in the hands of a notary in time for demand and protest, is not liable for the neglect of the notary. The distinction lies in those cases in which the law imposes the special duty performed, upon the notary, *as a public officer exclusively and peculiarly*, and those in which no such legal duty is imposed. In other words, where the notary acts in his public and official capacity and where he acts as a mere agent of the bank to perform a duty which could as well have been done without him. That distinction was not even adverted to by the Court, and it was said that a *note* figured in the Tiernan case, which was not true.

Bowling vs. Arthur, 34 Miss., 41, followed the last two cases; but the question did not properly arise, for the holder of the paper was suing the notary for a failure to give the requisite notices as required by the act of 1833. Hutch. Code, 868. The Court say it is too clear to admit of controversy, that under the provisions of this statute, notaries were *empowered* to demand payment of promissory notes, and to give the requisite notices, to charge parties sought to be rendered liable, as *official acts*. It was admitted that no such power at common law was conferred upon notaries public in cases of non-payment of promissory notes,

and that the power to make demand, and give notices, was vested in them by statute. The fact is, that the only question directly presented to the Court in that case, was this: Whether having the power to act officially, being required to act, and and having undertaken to act and received compensation, the plaintiff had the right to rely upon its being rightly done, and to sue the notary for his default. The Court say he would have been liable because of his undertaking to give the notice as "*required by the plaintiff or his agent.*" And the decision could well have been rendered without a discussion of the question involved in this case. The plaintiff, by suing the notary, made him his agent, and thereby waived his right of action against the bank. But the act of 1833 was not in force when the notes in our suit became due and payable, and the common law applicable to promissory notes prevailed here. The intervention of the notary was, therefore, useless.

The case of Baldwin vs. Bank of Louisiana, 1 La. An., 14, proceeded on the idea that the state laws provided for the appointment of notaries public, clothed with authority to make demand and protest of bills of exchange and *promissory notes*, and required them in their protests of bills and notes, to make mention of the demand, and the manner and circumstances of the demand, etc. On this account the court say: "It thus appears that an agent who entrusts to a notary public the duty of protesting, and giving notice of protest, *selects a public officer, who acts under the solemnity of an oath, and the authority of the executive commission and the laws of the land; whose official character implies a certain degree of skill and experience; whose protest fixes*

instantly and certainly the liability for interest; whose official records of the protest and notice remain though he shall depart, survive not only his recollection, but his life, and stand in perpetual remembrance of his official acts." The Court hence concluded that it *was the duty of the bank to employ a notary public for its principal.*

In Hyde & Goodrich vs. Planters' Bank of Mississippi, 17 La., 566, the Court hold, that under the statute of Mississippi, (1841,) which requires notaries public appointed by the executive authority of the State, *to give bond for the faithful performance of their duties, and makes them liable to be sued by any party injured by their want of care in the discharge of official duties,* a bank would not be responsible because of the notary's failure to keep a record of his official acts, as required by law, whereby the evidence of a proper demand was lost. "To make defendants liable for this neglect of official duty on the part of the notary, would be rendering them the sureties of that officer; it would be changing the ground upon which alone they could be held held liable, to-wit: That of negligence in the discharge of their duty to their principals. * * * If, by the fault, or neglect of the notary *they employed for plaintiffs*, the latter have suffered any injury, they must look to the sureties on his official bond, because such fault or neglect was a breach of his official bond."

The case of Baltimore vs. Howell, 8 Md., 547, holds that the act of 1837, ch. 253, made protests of inland bills of exchange and promissory notes *prima facie* evidence; and that, for the purpose of securing the benefit of this law to the owners of such instruments,

it was the duty of the banks receiving them for collection to place them in the hands of a notary, that they might be protested in due time when necessary. It was further stated that it was the *official duty* of the notary to make the necessary demand for payment. In this case the notary failed to give notice of dishonor to the endorser, and the reason assigned for exonerating the bank does not commend itself to our judgment.

No case can be found, however, which excuses a collecting agent who never presented a note for payment at all. It has always been held that he was bound to do this and answerable for the loss occasioned by his negligence in not doing it.

It will thus be seen that all the cases agree as to the duty of the receiving bank, and that they differ only as to its obligation to respond for the negligence of the agents employed in the discharge of a well recognized duty. Those courts which hold that, by handing the note or bill, *in due season*, to a notary for presentation, protest and notice, a receiving bank is discharged, are predicated of some local statute, which *requires* such a proceeding and imposes the duty, as an *official duty*, on the notary. The idea is that the law imposed the duty on the receiving bank, and the depositor, knowing this to be the fact, must be presumed to have intended this course to be pursued. The duty is to protect the owner of the paper, and to do those things which are necessary for his protection; as to things beyond, they are purely works of supererogation, and no exoneration can be predicated of them.

We conceive that our case is decided in Hoover vs. Wise, and the cases in 12th and 13th Blatchf. But if

not, in the absence of any statute here requiring notes to be protested, the other adjudications are for us. These cases may, we think, justify a general, rule, quite consistent with that announced in Hoover vs. Wise, and we state it thus:

When a bank receives a bill or note for collection, payable at the place of its domicile, it is bound to make a seasonable demand on the promisor, or drawee, and on its dishonor to give the requisite notices to charge all parties and protect the owner of the paper against loss. For any failure in this respect the bank would be liable. This duty would be discharged as to a *bill* received if it were handed, *after demand and dishonor*, at the proper time, to a notary public for *demand*, *protest* and *notice*, because, by the commercial law, this would be necessary and the duty could *only be discharged by the notary.* In the selection of the notary, the bank would be required to exercise reasonable skill, and to choose one whose competency and fidelity were known. If, in this respect, there be proper cause of complaint, the bank would be liable to the owner of the paper. The holder, in depositing a bill for collection, knows that the law, in case of presentation for payment and dishonor *required it to be protested;* and delivered it, upon the implied agreement, that the bank should entrust it to the public officer charged by law with the duty of making demand and protest, and that it should only be accountable for reasonable prudence and skill in the selection of that officer. In the case of a *promissory note* the intervention of a notary is not necessary, nor is any protest; the only thing requisite is, a seasonable demand upon the promisor, and notice to the indorsers in

case of refusal to pay. That duty could as well be performed by the employes of the bank, or the bankers themselves. If, therefore, the bank, or its agents or employes, including the notary, who is in such case, its agent, fail in making demand, and giving the proper notice of non-payment, liability would attach to it and not to the notary as sub-agent. When, however, the local law *requires promissory notes* to be protested in case of non-payment, and devolves this duty upon a public officer, sworn to discharge his duty and who is duly qualified, it would be the duty of the bank, *after it had made a seasonable demand, and the maker had failed to pay*, to hand the note to such officer, for demand, protest and notice, and it would not be responsible for his acts unless the officer selected were incompetent and unfaithful.

When a bank receives a note or bill payable at a a place beyond its domicile, to be transmitted for collection, the duty is discharged by a seasonable transmission, *with proper instructions*, to a reputable correspondent, and the receiving bank would not be responsible for the neglect of the collecting agent, because under the circumstances, the collecting agent becomes the agent of the owner of the paper.

The very effort to formulate a general rule suggests exceptions at every turn, and renders more unique and appropriate the doctrine stated in Hoover vs. Wise, and declared so ably in Allen vs. Merchants' Bank. This doctrine once firmly established will coerce a careful and faithful discharge of duty and the furtherance of the complicated commercial interests of the country. Under it, the collecting and receiving banks can protect themselves; without it, parties depositing

Supreme Court of the United States.

No 192,

AUDLEY C. BRITTON, SURVIVING PARTNER, ETC.,
PLAINTIFF IN ERROR,

vs.

ROBERT NICCOLLS.

W. L. HUGENT, for DEFENDANT IN ERROR.

Supreme Court of the United States.

No. 192,

AUDLEY C. BRITTON, SURVIVING PARTNER, ETC.,
PLAINTIFF IN ERROR,

vs.

ROBERT NICCOLLS.

I have not been favored with a copy of Mr. Lowndes' brief filed, but have recently learned that he relies for a reversal of the judgment in this case upon the decision of this court in Cox vs. National Bank, 100 U. S. 704. There is, we think, a broad distinction between the two cases and one which confirms the decision of the court below in the case at bar. In the case cited, notary entrusted with the acceptance of Cox & Cowan, made reasonable and diligent inquiry for the acceptors, and their place of business in New York City, "in the place or places frequented by them when there, and could not, after such inquiry, find them or any place of business of them or either of them." *He demanded payment on the day of the maturity of the bill, in business hours, at the place so frequented by them, when in said city, and payment of said bill was then and there refused.* The bill on its face shows that it was drawn in Hopkinsville, Kentucky, but it was addressed to the drawees at New York. The bill was really accepted in Kentucky, and the drawees at the time it was drawn and accepted, and when it matured, had their residence and place of business in Hopkinsville. E. M. Wright & Co., who endorsed the bill, were factors

and commission merchants in New York, in that capacity did business for Cox & Cowan, and in the course of such business the bill was received. During the course of this business each of the firm of Cox & Cowan, on different occasions, and up to June, 1875, visited New York on business, and while there wrote and received letters at the office of said Wright & Co., and looked after business intrusted to said factors. On those facts we do not well see how there could have been any controversy. The court below instructed the jury that the bill of exchange was in law *payable in the City of New York*, and if they believe that the notary made reasonable and diligent inquiry for the acceptors at their place of business in New York, at the place or places frequented by them in that city, and could not after such inquiry find them at their place of business, then the demand of payment *during business hours* on the day of the maturity of the bill at the place so frequented by them in the city of New York was sufficient. Id., 707.

This court sustains the instruction as given, holding that if the terms of the bill, independent of the address to the drawees and the acceptance written across the face of the bill, were considered, the theory of the defendants was correct; but that as the bill was addressed to "Messrs. Cox & Cowan, New York, N. Y.,"*as drawees*, and was by them accepted without explanation or condition, the legal construction of the instrument was that it became payable when it fell due *at the place designated by the address* as the place where the acceptance took place. The inference is quite reasonable that they accepted this bill as if they were at the time in the City of New York. It would be impossible otherwise to account for the facts, except upon the theory that the acceptors intended to compass a fraud. Why was the bill addressed to them at New York, and accepted without explanation, unless the intention of the parties was to make it payable in New York, at the place where Cox & Cowan transacted all their business in that city? Id., 715.

I understand the court as having decided that the bill having been addressed to the drawees at the city of New York, and they having accepted the same without qualification, explanation, or condition, the bill became payable in that city, as a matter of law, even though no mention was made of any dwelling, store, or place of business where the bill should be presented. Id. 717. The general rule on this subject, as stated by the court, is, that the place of business is where the acceptor resides, *or where on the face of the bill it is addressed to him*, unless some other place is specifically designated in the instrument. Story Bills, §§ 48, 282. And the rule that where there is no agreement indicating a different intention, and no circumstances showing such intention, the place of presentment is the place where the acceptor of the bill or maker of the note resides, or at their usual place of business; and that if no place is designated, or agreed upon, or indicated in the form of the

address, or the terms of the acceptance, the rule then is that the presentment for payment must be made at the home or domicile of the acceptor or maker, or at their usual place of business *during business hours*, is recognized by the court. 1 Daniel, Negotiable Instruments, §§ 90, 635.

Cox v. National Bank, therefore, fails to furnish an authority against the defendant in error. The demand for payment was made where, *by the terms of the contract*, it should have been made, and during business hours. In the case now before the court the notes were dated at Natchez, and on their face were payable generally,—no place being fixed therefor upon the face of the instruments. As matter of law, where were the notes payable? There can be no doubt here. When no place of payment is expressed in a note, the place of payment is understood to be where the maker resides. 1 Daniel, Negotiable Instruments, § 90; Story, Notes, § 639. The place of date in a note does not, of itself, make it payable there. Due diligence requires presentment to the maker at his dwelling or place of business. 1 Daniel, Negotiable Instruments, § 639. The place of date is *prima facie* evidence that it is the place of the maker's residence and place of business, and it is sufficient to charge an endorser to have the note in that place at the time of maturity, and to make proper enquiry after the place of the maker's residence or place of business, provided the holder does not know that his residence is elsewhere. Id. § 640. This, we believe, is the most liberal view to take of the law in favor of the plaintiff in error. If the maker of a note have *neither place of business nor residence*, then if the holder of the note is at the place where it is generally made payable, on the day of payment, with the note and ready to receive payment, it is sufficient to constitute a presentment or demand. Id. Note 2.

In the case at the bar it was distinctly shown that Lambert had no place of business in Natchez, and that his actual residence was in the country; it was further shown that the notes were not given to the notary for demand and protest until after banking hours; it was proven that the notary knew where Lambert resided; and the whole case was made by the court to turn upon the fact as to whether Britton and Koontz used reasonable diligence to ascertain the residence or place of business of Lambert. As a fact, the jury found that reasonable diligence had not been used by the bankers charged with the collection of the paper; in other words, that proper inquiry had not been made. The defendant in error lost his debt because of this neglect, and the bankers should make his loss good. I. Daniel, Negotiable Instruments; §§ 327, 341, 342.

WILLIAM L. NUGENT,
For Defendant in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1073.

THE UNITED STATES, APPELLANT,

vs.

LAWRENCE S. RABBITT.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 15, 1881.

SUPREME COURT OF THE UNITED STATES.

No. 1073.

THE UNITED STATES, APPELLANT,

vs.

LAWRENCE S. BABBITT.

APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims, December term, 1880.

LAWRENCE S. BABBITT
vs.
THE UNITED STATES. } No. 12369.

I. *Petition.—Filed August* 26, 1880.

To the honorable the chief justice and judges of the Court of Claims:

1. Your petitioner, Lawrence S. Babbitt, respectfully represents that he is a citizen of the United States, and an officer of the Regular Army of the United States, at present holding the rank of major of ordnance, and stationed at Fortress Monroe, in the State of Virginia.

2. That heretofore he was regularly appointed a cadet of the United States Military Academy at West Point, and was admitted in that capacity to that institution on the 12th day of June, in the year 1857, he having in the January following signed the articles of engagement required by the twenty-eighth section of the act of July 5, 1838, entitled "An act to increase the present military establishment of the United States and for other purposes," by which he engaged to serve the United States, in a military capacity, for the term of eight years, unless discharged, and complied with all the other requirements of law, to entitle him to admission to said academy as a cadet.

2 3. That your petitioner remained at said institution from the said 12th day of June, 1857, performing all the duties enjoined upon him by law, or imposed by his superior officers, until the 1st day of July, 1861, when he was duly graduated from said academy; and, thereupon, he was duly appointed and commissioned by the President of the United States, a second lieutenant in the Third Regiment of Artillery of the United States, which commission bears date on the 24th day of June, 1861; that on the 3d day of March, 1863, he was duly appointed and commissioned by the President of the United States a first lieutenant of ordnance; that on the 22d day of December, 1866, he was in like manner appointed and commissioned a captain of ordnance; that on the 10th day of May, 1878, he was, in like manner, appointed and commissioned a major of ordnance, which position he now holds and is performing the duties thereof; that he duly accepted the promotions herein stated, and faithfully discharged the duties they imposed upon him, and his said several commissions bear date as herein stated; and that since the said 12th day of June, 1857, he has remained continuously in the service of the United States, in a military capacity, and discharged the various duties imposed upon him by law, in the different positions to which he has been promoted.

4. Your petitioner further represents that the twenty-fourth section of the act of July 15, 1870, entitled "An act making appropriations for the support of the Army for the year ending June 30, 1871, and for other purposes," after fixing the pay of the officers mentioned therein, provides as follows:

"There shall be allowed and paid to each and every commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each and every term of five years of service: Provided, That the total amount of such increase of length of service

3 shall in no case exceed forty per centum of the yearly pay of his grade as established by this act."

5. Your petitioner further represents that the seventh section of the act of June 18, 1878, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1879, and for other purposes," provides as follows:

"SEC. 7. That on and after the passage of this act all officers of the Army of the United States who have served as officers in the volunteer forces during the war of the rebellion, or as enlisted men in the armies of the United States, regular or volunteer, shall be, and are hereby, credited with the full time they may have served as such officers and as such enlisted men, in computing their services for longevity pay and retirement."

6. Your petitioner further represents that he is advised by legal counsel, and verily believes that by virtue of said section seven of the act of June 18, 1878, he is entitled, in computing his longevity pay, to include the four years of military service he rendered the United States as a cadet at the Military Academy; and that, under this construction of said section, there is due him from the United States, from the 18th day of June, 1878, to the 18th day of August, 1880, as longevity pay, the sum of five hundred and eighty-one dollars and twenty-four cents, as per the account hereto attached, which sum the United States, through its proper accounting officers, refuses to pay.

7. Your petitioner further represents that he has at all times borne true allegiance to the Government of the United States, and that he has never, in any way, voluntarily aided, abetted, or given encouragement to rebellion against said government.

Your petitioner therefore prays for judgment for the said sum of five hundred and eighty-one dollars and twenty-four cents.

W. PENN. CLARKE,
Solicitor for Claimant.

4 THE STATE OF VIRGINIA,
County of Elizabeth City, ss:

Lawrence S. Babbitt, on oath deposes and says, that he is the claimant named in the foregoing petition; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made; that, as he is advised and believes, he is justly entitled to the amount therein claimed from the United States, after allowing all just claims and set-offs; and that he verily believes the facts stated in said petition are true.

LAWRENCE S. BABBITT.

Subscribed and sworn to before me this 24th day of August, A. D. 1880, as witness my hand and official seal.

[SEAL.] SELWYN E. BICKFORD,
Notary Public.

Post-office address of claimant, Fortress Monroe, Va.
Post-office address of solicitor, Washington, D. C.

The United States to L. S. Babbtt, major of ordnance, Dr.

For over 20 years' service—difference between 15 and 20 years' service; from the 18th of June, 1878, to the 18th August, 1880, 26 months, at $250 per year	$591 66
Deduct half-pay for 15 days' leave of absence	10 42
	$581 24

I claim that the law of Congress, approved June 18, 1878, recited in G. O. No. 87, War Department orders of 1878, authorizes me to include my service as a cadet at West Point, N. Y., in determining my rights to longevity pay. This account is to recover accordingly.

L. S. BABBITT,
Major Ord.

5 II. *Traverse.—Filed Oct.* 29, 1880.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

6 III. *Fingings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. The claimant reported at the Military Academy at West Point as a candidate for admission June 11, 1857, and was admitted as a conditional cadet July 1, 1857, and received his warrant as a cadet on the 6th of February, 1858.

II. On the 1st of July, 1857, when the said claimant was so admitted as a conditional cadet, he entered into an agreement, as required by law, in the words and figures following, to wit:

"UNITED STATES MILITARY ACADEMY,
"*West Point, N. Y., July* 1, 1857.

"I, Lawrence S. Babbitt, appointed at large, aged eighteen years four months, having been selected for an appointment as cadet in the Military Academy of the United States, do hereby engage, with the consent of my father, in the event of my receiving such appointment, that I will serve in the Army of the United States for eight years, unless sooner discharged by competent authority; and I, Lawrence S. Babbitt, do solemnly swear that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whatsoever, and that I will observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war.

"LAWRENCE S. BABBITT.

"Sworn and subscribed to at West Point, New York, this sixth day of February, eighteen hundred and fifty-eight, before me.

"CHAS. DRAKE,
"*Clerk of Orange County.*"

III. The said claimant remained at said institution from the said 11th day of June, 1857, performing all the duties enjoined upon him by law,

or imposed by his superior officers, until the 1st day of July, 1861, when he was duly graduated from said academy; and, thereupon he was duly appointed and commissioned by the President of the United States a second lieutenant in the Third Regiment of Artillery of the United States, which commission bears date on the 24th day of June, 1861; and on the 3d day of March, 1863, he was duly appointed and commissioned by the President of the United States a first lieutenant of ordnance; and on the 22d day of December, 1866, he was in like manner appointed and commissioned a captain of ordnance; and on the 10th day of May, 1878, he was in like manner appointed and commissioned a major of ordnance, which position he now holds, and is performing the duties thereof. He duly accepted the promotions herein stated, and faithfully discharged the duties they imposed upon him, and his
7 said several commissions bear date as herein stated. Since the said 11th day of June, 1857, he has remained continuously in the service of the United States, in a military capacity, and discharged the various duties imposed upon him by law in the different positions to which he has been promoted.

IV. Prior to and since 1858 each person appointed a cadet at the United States Military Academy received a written paper, signed by the Secretary of War, which was as follows, the blanks being filled by the name of the person appointed and with the appropriate dates:

"To whom it may concern:

"Know ye that the President has been pleased to appoint a cadet of the United States Military Academy, to rank as such from the day of , 18 .

"Given under my hand and seal, at the War Department, this day of in the year of our Lord 18 , and of the Independence of the United States the .

"*Secretary of War.*"

Claimant received a document written and executed in the above form when he entered the United States Military Academy in 1858.

V. If the period during which the claimant was a cadet at West Point is to be regarded in the computation of longevity pay, the claimant is entitled to judgment for $536.47 in addition to the compensation which he has already received; otherwise his petition should be dismissed.

CONCLUSION OF LAW.

On the foregoing facts the court decides, as conclusion of law, that the claimant's petition should be dismissed. But it appearing that the amount in controversy in this case does not exceed $3,000, and that the claimant's counsel moves for the entry of a pro forma judgment in the claimant's favor, and that the Assistant Attorney-General assents thereto, the court, notwithstanding said decision, orders judgment to be entered in the claimant's favor for $536.47.

IV. *Opinion of the court.—Feb.* 28, 1881.

DAVIS, J., delivered the opinion of the court.

The claimant, who is a major in the Ordnance Department, entered the Army after the usual service as a cadet at West Point. In the computation of his longevity pay his period of service is calculated by the

accounting officer from the date of his commission as second lieutenant. The seventh section of the act of June 18, 1878, provides:

"SEC. 7. That on and after the passage of this act, all officers of the Army of the United States who have served as officers in the volunteer forces during the war of the rebellion, or as enlisted men in the armies of the United States, regular or volunteer, shall be, and are hereby, credited with the full time they may have served as such officers and as such enlisted men in computing their service for longevity pay and retirement." (20 Stat. L., 150.)

The claimant maintains that while at West Point he was "an enlisted man in the armies of the United States," and that this provision entitles him to be credited with the full time spent at the academy prior to the date of his commission. This suit is brought to recover the difference in longevity pay which that change in the mode of calculation would make.

The act of June 18, 1878, contains the annual appropriations for the Army. The section above cited is part of general legislation about the Army attached to that appropriation act. Among the results effected by this general legislation was a change in the mode of filling vacancies in the lowest grade of commissioned officers in the Army.

Prior to that date the President could make these appointments indiscriminately from the graduates of the academy, or from non-commissioned officers of the Army, or from civil life.

The graduate had a right to be considered as a candidate for any corps for whose duties he might be deemed competent; (Rev. Stat. § 1213), but he had no right to an appointment in preference to men selected from other classes. The third section of the act of 1878 peremptorily provides "that hereafter all vacancies in the grade of second lieutenant shall be filled by appointment from the graduates of the Military Academy, so long as any such remain in the service unassigned."

Prior to the act of 1878 non-commissioned officers could, under regulations established by the Secretary of War, be examined by a board of four officers as to their qualifications for the duties of commissioned officers in the line of the Army, and were eligible for appointment as second lieutenants in any corps in the line for which they might be found qualified, but had no absolute right to it. (Rev. Stat. § 1214.) The fourth section of the act of 1878 makes it the duty of every company and battery commander to report to his regimental commander the names of the non-commissioned officers in his command whom he deems worhy of advancement, with his reasons for the opinion. It requires regimental commanders to forward the reports to the departmental commander, with such recommendations of non-commissioned regimental staff as they may deem worthy of promotion. It directs the departmental commander annually to convoke a board to pass upon these recommendations, and it requires the reports of these boards, with full statements as to each person, to be forwarded to the Secretary of War. Similar provisions are made as to staff corps. Then section 3 directs the President, after exhausting the list of unassigned graduates to fill the remaining vacancies by promotion from the list of non-commissioned officers made up from these recommendations.

As to appointments from civil life, the act of 1878 worked this change—that prior to that act such appointments could be made to the grade of second lieutenant, at the option of the appointing power; but that after it they could only be made after exhausting the classes of graduates and of meritorious non-commissioned officers.

The longevity provisions in section 7 of the act, so far as they related to enlisted men, were evidently framed with reference to the provisions in sections 3 and 4 changing the rule for entry into the Army. Under the new system, promotions from the ranks, which were before to be made at the discretion of the Secretary of War, would become inevitable when the supply of graduated cadets should fail. In order to meet this and to do justice to faithful and meritorious soldiers, Congress provided that the period of their services in the ranks should be taken into consideration in calculating their longevity pay. For this purpose it was not necessary to change the pay of officers coming into the Army through West Point. If any change has been made in their status, it has been done by the use of comprehensive language, which compels us to go beyond the evident purpose of the legislature. That no such language has been used we now proceed to show.

The claimant's case rests upon a construction of section 7 of the act of 1878, by which it is made to include cadets in the category of "enlisted men." Now, it is demonstrable that the phrase "enlisted men" is used in section 1 of that act in a sense which excludes cadets.

9 The language in section 1 is: "No money appropriated by this act shall be paid for recruiting the Army beyond the number of 25,000 enlisted men, including Indian scouts and hospital stewards."

At the close of the war an act was passed "to increase and fix the military establishment of the United States." (14 Stat. L., 332.) The number of companies in each line regiment of artillery, cavalry, and infantry, and in the Corps of Engineers, and the number of privates in each company were regulated by this act; and it was further provided that 1,000 men might be enlisted as Indian scouts (§ 6), and that the Secretary of War might enlist as many hospital stewards as he might think necessary.

J. B.

In 1870 this force was reduced. By the second section of the Army appropriation act of that year it was enacted:

"That the President be, and he is hereby, authorized and directed, on or before the first day of July, eighteen hundred and seventy-one, to reduce the number of enlisted men in the Army to thirty thousand, and thereafter there shall be no more than thirty thousand men enlisted in the Army at one time, unless otherwise authorized by law." (16 Stat. L., 317.)

In consequence of the passage of this act General Order No. 23 was issued in the year 1871, containing the following language:

"Under the foregoing act the following will be the organization of the Army from and after July 1, 1871: 'Enlisted men of engineers, 301; enlisted men of ordnance, 475; ordnance sergeants at posts, 200; Military Academy band, 24; 60 enlisted men per company for 55 companies of artillery, 3,300; 84 enlisted men per battery for 5 batteries of light artillery, 420; 84 enlisted men per company for 120 companies of cavalry, 10,080; 60 enlisted men per company for 250 companies of infantry, 15,000; non-commissioned staff of regiments, 200; total, 30,000. The rate of enlisted men per company is to include non-commissioned officers and all other grades.'" (Scott's Digest, § 504, n. 12.)

Departmental estimates were made on the basis of this order, and were sent to Congress; and appropriations were made on the basis of the estimates until the session of 1873–'4, except that a special provision in regard to Indian scouts was made in 1871. During this whole period the usual separate annual appropriation was made for the cadets and the academy.

By the appropriation act of June 16, 1874, it was provided that "no

money appropriated by this act shall be paid for recruiting the Army beyond the number of 25,000 enlisted men, including Indian scouts." (18 Stat. L., 72.) The appropriation act of the next year repeated this provision, except that hospital stewards were added to Indian scouts as included within the 25,000 enlisted men. (18 Stat. L., 452.) This form has been since retained (19 Stat. L., 97; 20 Stat. L., 146), and is identical with what we find in the act of June 18, 1878. The appropriations for the support of the academy continue to be separate. (18 Stat. L., 59, 466; 19 Stat. L., 124, 380.)

The conclusion is irresistible that the term "enlisted men," in section 1 of the act of June 18, 1878, refers only to the classes embraced in General Order No. 23, and to Indian scouts and hospital stewards, and does not include cadets. This raises a controlling presumption that the same phrase is used in the same sense in section 7; for the rule is well settled that if the same words occur in different parts of a statute they must be taken to have been everywhere used in the same sense when applied to the same subject-matter. (Dwarris on Statutes, 574.)

Such is the present legislative construction of this act, as shown by two statutes passed since this case was argued. The first is the annual appropriation for the Army, approved February 24, 1881, by which it is enacted that "the actual time of service in the Army or Navy, or both, shall be allowed all officers in computing their pay." If the claimant's construction of the act of 1878 is correct, this legislation is unnecessary, since cadets are part of the Army (Rev. St., § 1094), and as such in the military service. The second is the act for the relief of T. Scott Payne, approved March 2, 1881. Captain Payne entered the academy in 1862, was appointed a second lieutenant in 1866, resigned in 1868, and re-entered the Army as a second lieutenant in 1873 (Army Register). Congress now enacts that the paymaster, in computing his longevity pay, shall compute the same from the date of his original commission as second lieutenant, and appropriates the difference between what he would have received under this mode of computation and the amounts he has actually received. The clear intent of this act is to put Captain Payne on the footing which he would have been on had he never resigned, and give him longevity pay according to the statutes as Congress understood them to be in force as to his classmates who remained in the service.

We should rest our decision here if the able and ingenious briefs of counsel did not raise and discuss other points upon which we entertain opinions equally fatal to the claimant.

"Enlistment" is a technical word, derived from Great Britain, with a technical meaning. In the English Cyclopedia it is defined to be "a voluntary engagement to serve as a private soldier for a certain number of years." Chambers defines it as the mode by which the English army is supplied with troops as distinguished from the conscription prevailing in many other countries." Littré, the best French authority, defines conscription as an "appel au service militaire, par voie du tirage au sort," and he defines an enrolé, which is the equivalent of an "enlisted man," as an "enrolé volontaire." True to this distinction between a voluntary engagement as distinguished from a conscription or draft the statutes of the United States allow only persons who are able to contract to enter the Army by enlistment (Rev. Stat., §§ 1116, 1117, 1118), and require the contract to be made for a term of years. (§ 1119.) True also to the other idea that this form of engagement is confined to persons who are ordinarily known as common soldiers, the statutes employ the term "enlist" only with refer-

ence to contracts with persons who enter the Army as privates, and to certain other classes of men, like Indian scouts and hospital stewards, who rank like soldiers, and voluntarily put themselves under military law. (Rev. Stat., §§ 1099, 1100, 1101, 1102, 1103, 1104, 1107, 1108, 1111, 1112, 1115, 1155, 1162, 1180.) They not only do not make use of this word or term in providing for the engagement of cadets, but they impose upon the person technically known as an "enlisted man" many duties which it is evident are not to be imposed upon cadets. Without multiplying examples, it is enough to say that the Secretary of War may appoint as many enlisted men as he pleases to be hospital stewards (Rev. Stat., § 1180), and that he may detail enlisted men for regimental schools (Ib. § 1231). It is not for a moment to be supposed that a Secretary of War would appoint or detail cadets for such purposes; but it is equally improbable that Congress would empower him to do so. And yet Congress has done that improbable act, if the term "enlisted men" necessarily includes cadets.

The idea of an army implies a mass which is led, and leaders or officers who direct it. The leaders, from their natural endowments or from their superior education in military science and training in military art are presumed to be capable of giving direction and vitality to the mass.

11 This distinction, which grows out of natural laws, and is common to all history, is recognized in the statutes of the United States. We have already seen what provisions they make for keeping up the rank and file of the Army. It is only necessary to add to what has already been said on that point that some of the more meritorious of common soldiers become what are commonly called, and what are known in the statutes as, non-commissioned officers. (Rev. Stat., §§ 1110, 1196, 1214, 1286, 1288, 1341, 1342.) But these non-commissioned officers are not officers in the sense in which that word is generally used in the statutes, and in the articles of war, and in common parlance. The statutes recognize them as common soldiers and as enlisted men. (Rev. Stat., §§ 1280, 1293.)

The position and rank of Army officers depend, as does the status of the common soldier, upon positive provisions of law. The Revised Statutes sometimes style them commissioned officers (§§ 1145, 1160); sometimes draw a distinction between commissioned and non-commissioned officers (§§ 1196, 1214, 1286, 1288, 1342); sometimes enumerate the different classes of officers (§1261); sometimes indicate the particular branch of the service to which they belong (§§1135, 1138, 1143, 1150, 1167, 1169, 1174, 1183, 1184, 1191, 1192, 1206, 1208); and sometimes make general provisions respecting "officers" (§§1205, 1209, 1211, 1212, 1217, 1219 to 1230). But in each and every case such statutes relate only to what are known as commissioned officers; that is, officers who hold, as evidence of their right to office, a commission, signed by the President, and sealed with the seal and attested by the Secretary of the Department of War. Commissions of this kind were issued by the Secretary of War under the old Confederation. The Constitution continued the power, vesting it in the President; and the act of August 7, 1789 (1 Stat. L., 49; Rev. Stat., § 216), made the Department of War the channel for its exercise.

Now the cadet receives quite a different evidence of his title to office, viz, a certificate under the hand and seal of the Secretary of War that the President has been pleased to appointed him a cadet. We are informed that the same form of certificate, with trifling variations, has been in use for as long a time as records exist regarding them, and that

there is no tradition of any other form. This long and settled usage or custom has the force of law. It is recognized by Congress when it legislates respecting commissioned officers, and it affects the status of a cadet in so far that he certainly is not a commissioned officer.

On the other hand it may be said with equal certainty that he is not an ordinary private soldier. The private soldier enlists himself (ante); but the cadet is to be appointed by the President (Rev. Stat., § 1315), and can make no engagement with the government without that preliminary appointment. The qualifying age of the cadet differs from that of the enlisted soldier and indicates a different object. The term of enlistment of the private is five years, with a right to re-enlist; the cadet agrees to serve for eight years (of which only four will be spent as a cadet if his deportment and standing warrant advancement), and if once put out of the Army cannot re-enter as a cadet of his own volition. The enlisted man is to serve as a private soldier in the ranks, or as a non-commissioned officer if selected for that purpose, or as a hospital steward or Indian scout, if enlisted therefor; the corps of cadets constitute a battalion, and its members are to be taught and trained not only in all the duties of private soldiers and of non-commissioned officers, whom they may be expected to care for and look after
12 and lead during their whole lives, but also in all the duties of commissioned officers of every grade which they may afterward occupy.

Being thus required to serve for a term, during one-half of which he is to be trained in the duties of an officer, and during the remainder of which he may serve as a commissioned officer, and being appointed to his post by the President, a cadet is, in our opinion, an officer—one of that class of inferior officers alluded to in Collins vs. The United States (14 Ct. Cls. R., 568), in which the subject of appointment to such offices was fully discussed. He is never a part of the rank and file of the Army which is to be led; on the contrary, his destiny from the outset is to be among the officers or leaders, for which alone he is educated and trained. The radical test of his relation to the government is this—that he is appointed by the President. The second section of the second article of the Constitution empowers Congress to vest the appointment of inferior officers by law in the President alone. Congress has exercised its power in this respect in the very language of the Constitution. It has enacted that the corps of cadets "shall be appointed by the President." (Rev. Stat., § 1315.) In our opinion, this as clearly makes each member of that corps an inferior officer as if the statute proceeded to declare him so.

But though an inferior officer, his status is in no respect that of a non-commissioned officer. The non-commissioned officer is selected and appointed from the ranks by the regimental commander (Regulation 73), and may be arbitrarily reduced there by the power which appointed him. (Ib., 79.) But the cadet, although for purposes of instruction he may temporarily serve as a private soldier or as a non-commissioned officer within the limits of the academy, bears those relations only as a pupil, and only towards his fellow cadets and the officers of the academy. Towards the government and the Army at large his relation is that of an uncommissioned officer, with a warrant of the Secretary of War as the evidence of his title. There is nothing singular in the form of this quasi-commission, for in the consular service vice-consuls and consular agents receive similar evidences of title to their respective offices. Through the appointment which it evidences the cadet has under existing laws vested rights in his office of which no superior can

deprive him, except in the mode prescribed by law, and for faults or negligences of his own.

The learned counsel for the claimant, in his elaborate brief, refers to the origin of the title "cadet," and to the rise and growth of that grade in the Army. The examination which he invites is instructive. The first Congress under the Constitution continued for one year the Army of 840 men, then in existence. (1 Stat. L., 95; 12 Am. St. Pap., 5.) Power was then given to enlist an army for three years, a portion of which was to consist of a battalion of artillery. (1 Stat. L., 119.) When the term of enlistment for this artillery corps was about to expire Congress authorized its enlargement by enlistments for three years, to the number of 992 in all, exclusive of commissioned officers. (Act of May 9, 1794; 1 Stat. L., 366.) The newly-created force was to be organized into four battalions of four companies each, with regimental, battalion, and company officers, and was to be denominated the corps of artillerists and engineers. The company officers were to consist of one captain, two lieutenants, two cadets, four sergeants, and four corporals for each company. Each company was to have 42 privates, sappers, and miners; 10 artificers, and 2 musicians, or 54 men below the grade of corporal. Add to these the 4 sergeants and the 4 cor-
13 porals, and we have 62 men. Multiply 62, the number of men in each company, by 16, the number of companies, and we have 992.

Thus it is demonstrated mathematically that the 32 cadets formed no part of the 992 men who were to constitute what remained of the company after excluding its commissioned officers. The conclusion is inevitable that they were to be themselves a part of the enumerated excluded body; and thus we find the cadet, on his first appearance in the Army, treated by Congress as a commissioned officer.

The Executive also so regarded him, or at least did not look upon him as a non-commissioned officer or private; for in the estimates for 1798 the War Department asks Congress to appropriate for clothing in the artillery regiment of "32 cadets and 1,002 non-commissioned officers and privates," and in an enumeration of the 1,002 men it appears affirmatively that they constituted all the non-commissioned officers and privates in the corps, and that the cadets did not form part of them. (12 Am. Stat. Pap., 122.)

In the sixth section of the act of July 16, 1798 (1 Stat. L., 604), which was passed a few weeks later than this estimate, the cadet is undoubtedly classed among non-commissioned officers and privates. The claimant's counsel lays great stress on this fact as showing the final determination of Congress; but in view of its manifest connection with previous legislation, and of the subsequent repeated explicit declarations of Congress to the contrary, we think it is entitled to no weight.

It is found in a section whose object is to increase the pay of non-commissioned officers and privates over those fixed by the act of March 3, 1795, in which the cadet was not mentioned. (1 Stat. L., 431.) With this purpose in view, the word "officers," which had been used in the previous act, is omitted in the general descriptive language, and the terms "non-commissioned officers," &c., descriptive of the various classes whose pay was to be raised, are retained.

Shortly before the passage of the act of 1798 the Secretary of War wrote to the chairman of the Congressional Committee of Defense that it was supposed that cadets would form a nursery from which qualified officers would be drawn, and that it was desirable to increase their pay. (12 Am. Stat. Pap., 129.) The Secretary's suggestions were incorporated in that part of the act of July 16, 1798, which provided for the in-

crease of the pay of non-commissioned officers and privates; but in view of the haste and inadvertence with which legislation is sometimes made, it would be wrong to infer that Congress intended by this collocation in the act to reverse a well-digested policy, founded upon the soundest principle.

If the act of 1798 threw any real doubt on the purpose of Congress, that doubt was removed by the act of April 12, 1808 (2 Stat. L., 481), which authorized the President to raise regiments of infantry, artillery, riflemen, and dragoons, with cadets in each regiment. In providing for the pay of these regiments it is enacted that "the compensation of the officers, cadets, non-commissioned officers, musicians, artificers, and privates authorized by this act shall be," &c. The classification thus made is three times repeated in the act, and again occurs in the seventh section of the act of January 11, 1812. While it takes the cadet out of the rank of commissioned officers, where he was put by the act of 1794, it leaves him in a grade by himself, as an officer between the commissioned and the non-commissioned officer. There he has continued; and we have seen that existing law still makes him an officer identical with his classification in these early acts.

The acts concerning the Military Academy contain nothing in-
14 consistent with this view. The act of March 18, 1802 (2 Stat. L., 132), directed a Corps of Engineers to be organized in which there were to be ten cadets, and the corps was to constitute the Military Academy. The cadets already in the Army were not disturbed by this act. It is evident that the ten new cadets were not to find their way into the Army by enlistment, for the words "organize" and "establish" were used both with reference to them and to the regimental and other officers. A year later, however, Congress desired to add artificers and privates to this corps, and then it made use of the technical word "enlist" (act of February 28, 1803; 2 Stat. L., 206), which it had not employed to define the engagement of the cadet.

Under the act of April 29, 1812, (2 Stat. L., 720) from which the real existence of the academy in its present form dates, and which contains most of the important provisions codified in the Revised Statutes, the various branches of cadets were gathered into one body of students at West Point. The cadet disappeared as a feature in company organization in the Army, and was soon legislated out of that organization (3 Stat. L., 615); but his status toward the government and his rank in the service remained unchanged.

One further consideration is equally fatal to the claimant. In the recent case of Fendall vs. The District of Columbia, our brother Richardson, on behalf of the court, said:

"The court cannot avoid taking a judicial notice of passing events of great public interest and widespread notoriety, well known and familiar alike to suitors, counsel, and judges, and of the commonly understood meaning of words and phrases specially applied to particular subjects and things in the community and among business people, when such words and phrases are introduced into statutes legislating upon those subjects."

If we had any doubt that a cadet is not generally regarded as an enlisted man, and that that term is not used in the community in a sense which includes him, our doubts would be removed by the admissions in the argument of the claimant's counsel. But we have no doubt that when Congress used that term it did not understand that it was employing a term applicable to the members of the Military Academy,

and it is our duty to give the words a judic'al construction in harmony with the popular sense in which Congress employed them.

Some of the propositions in the claimant's brief deserve notice before closing this opinion, already extended to an unexpected length.

I. He says, in substance, that signing articles of agreement to serve in the Army and taking an oath is the form of enlistment; that the cadet does both on his admission to the academy, and that therefore he is an enlisted man. If it were true that all persons who sign articles to serve in the Army, and take an oath, thereby enlist, the argument would be sound. But we have seen that only those enlist who agree in manner provided by law to serve for the time indicated in the statutes as privates or their equivalent, like non-commissioned officers, hospital stewards, Indian scouts, &c. The cadet does not engage to serve as a private. On the contrary the government agrees with him that he shall hold a commission for a portion of his engagement, if he conducts himself properly and there is a vacancy.

II. That cadets may be ordered by the President into the field as other forces are. The acts placing them in the Army (§ 1094) and under the directions of the President (§ 1323), must be constructed with reference to the objects for which the corps is created and the duties assigned to it by statute. The general power is restrained by
15 the duty imposed upon the President to cause the cadets to be arranged into companies and trained in the duties indicated by statute. And if the President, in the exercise of supreme power, may order cadets into the field, as he may the commanding general, it no more follows that the cadet becomes a common soldier than that the general does in such case.

III. That they are entitled to pensions for wounds and disabilities incurred in the line of their duty. An opinion of Mr. Wirt (1 Op. Att'y. Gen., 348) is cited in support of this position. That opinion related to an act which entitled officers to such pensions; and Mr. Wirt's conclusion might well have been sustained on that ground. So far as it holds cadets to be enlisted men it is clearly wrong.

IV. That since the act of June 18, 1878, the Secretary of War has, in the Army Register, given an executive construction of the act favorable to the claimant. It may well be questioned whether the alleged act amounts to such a construction; but even if it were so it would be too recent to be entitled to weight.

V. That while at the academy cadets perform the duties of common soldiers. This is a necessary part of an officer's instruction, without which the cadet's education would be incomplete. He is also required to be trained in the duties of an officer; but it does not follow that the performance of those duties makes him an officer.

VI. That they are governed by the rules and articles of war, and are liable to be tried by court-martial in like manner as other soldiers.

The act of March 16, 1802, made the ten cadets authorized by it a part of the Engineer Corps, and the Engineer Corps a part of the Army. The cadets attached to other corps were likewise in the Army. As such they were governed by the rules and articles of war prescribed by the act of April 10, 1806 (1 Op. Att'y. Gen., 286). The act of April 29, 1812 (2 Stat. L., 720), brought the cadets together, but made no change in their subjection to the articles of war.

The Revised Statutes also expressly subject them to court-martials; by section 1326 to general court-martial; and by article 82 of the articles of war to a garrison court-martial. No difficulty is suggested until we come to consider for what offenses they are justiciable.

Prior to the Revised Statutes they were, like any other soldier, justiciable by a court-martial for any violation of the articles of war. But the section introductory of the articles of war in the Revised Statutes, section 1342, contains these words: "The armies of the United States shall be governed by the following rules and articles: The word officer, as used therein, shall be understood to designate commissioned officers; the word soldier shall be understood to include non-commissioned officers, musicians, artificers, and privates, and other enlisted men," and it is argued that as a cadet is not a commissioned or a non-commissioned officer, or a musician, artificer, or private, he is not subject to the articles of war unless he is an enlisted man.

This presents no real difficulty. No one supposes for an instant that Congress did not intend to subject the cadets to the articles of war. If it were necessary, in order to carry into effect the undoubted legislative will, it might be held that a cadet is an enlisted man for the purposes of section 1342 of the Revised Statutes, but that he is not one in any other relation to statute law.

It is not, however, necessary to resort to such a construction. The purpose of the enumeration under the word soldier is manifest. Without it there would have been a doubt whether musicians, artificers, and other enlisted men, such as hospital stewards and Indian scouts, were subject to the articles. This enumeration made it clear that every enlisted man was to be subjected to them.

16 It will be observed that the statute uses a different verb in the two cases. The word officer is to be understood to "designate" commissioned officers; that is, to point out or specify this particular class of officers to the exclusion of all others. But as to the word soldier, the statute only says that it is to "include" certain enumerated classes; that is, that all those classes are to be included, although some of them in common parlance are not regarded as soldiers. This does not necessarily exclude other soldiers. The commanding general of the armies and the humblest private are alike soldiers, and as such are alike made subject to the articles of war by that provision of section 1342 of the Revised Statutes which says: "The armies of the United States shall be governed by the following rules and articles." The section next provides that the commanding general and other commissioned officers shall be designated in the articles as "officers." It then furnishes one other designation namely, "soldiers," as applicable to every other person subject to the articles, and finally it provides that all classes of enlisted men shall, under the generic name soldier, be subject to the articles, although not commonly regarded as soldiers. This seems to us to be the construction of the act most natural, most reasonable, and most in accordance with the evident intent of the legislature.

The logical conclusion from the foregoing would be judgment for the dismissal of the petition. But as the amount in controversy is only $536.47, and as the claimant's counsel represents that this is a class case, and moves for the entry of a pro forma judgment in the claimant's favor in order to afford an opportunity for a review, and as the counsel for the government consents to the entry of such a judgment, it is therefore ordered, pro forma, that the claimant do have and recover of the defendants the sum of five hundred and thirty-six dollars and forty-seven cents.

The court ordered that the entry of judgment be suspended.

17 V. *Motion for rehearing.—Filed Mar.* 26, 1881. *And order overruling same.—Filed Mar.* 28, 1881.

Comes now the claimant, and moves the court here for a rehearing in the above-entitled cause, and for reason thereof, shows to the court the following:

1. The court erred in holding that the cadets of the Military Academy, do not come within the term enlisted men as used in the section of the act of , 1878.

2. Because the act entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1882, and for other purposes," approved Feb'y 24, 1881, expressly provides that "additional pay to officers for length of service, to be paid with their current monthly pay, and the actual time of service in the Army or Navy, or both, shall be allowed all officers in computing their pay."

W. PENN CLARKE,
Att'y for Claimant.

And now, to wit, March 28, 1881, it is ordered that the motion for rehearing be overruled.

18 VI. *Final judgment of the court, March* 28, 1881.

At a Court of Claims held in the city of Washington, on the 28th day of March, A. D. 1881, the following judgment was ordered to be entered:

The decision in this case having been adverse to the claimant and the amount involved not being sufficient to allow of an appeal on his part, and it appearing to the court that this is a class case, and the Attorney-General, upon the intimation of the court that, in its opinion, this is a proper case for the entry of a pro forma judgment for the purpose of an appeal, having consented that such judgment be entered, it is now ordered that judgment pro forma be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the said Lawrence S. Babbitt do have and recover of and from the United States the sum of five hundred and eighty-one $\frac{24}{100}$ dollars ($581.24).

19 VII. *Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 28th day of March, 1881, in favor of claimant, the defendants, by their Attorney-General, on the 26th day of April, 1881, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Filed April 26th, 1881.

And now, to wit, April 26, 1881, it is ordered that the appeal of the defendants be allowed as prayed for.

20 VIII.

In the Court of Claims.

LAWRENCE S. BABBITT
vs.
THE UNITED STATES. } No. 12369.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact by the court, and the conclusion of law thereon; of the opinion of the court; of the motion for rehearing and order overruling same; of the final judgment of the court; of the application of defendants for allowance of appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this sixteenth day of September, A. D. 1881.

[SEAL.]

JOHN RANDOLPH.
Ass't Clerk, Court of Claims.

(Indorsement on cover:) No. 1073. The United States, appellant, vs. Lawrence S. Babbitt. Court of Claims. Filed October 15, 1881.